Supreme Court, U.S.
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Nos. 99-244 and 99-253

IN THE

Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
AND
MARATHON OIL COMPANY,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

BRIEF FOR PETITIONER MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

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QUESTION PRESENTED

Whether the Federal Circuit erred in holding – contrary to decisions of this Court, other courts of appeals, and state courts, as well as the *Restatements* and leading treatises – that petitioner could not obtain restitution of the $78 million paid to the United States for oil and gas leases following the enactment of a statute that the trial court found "clearly reduce[d] the value and materially alter[ed] the structure and framework" of those leases, because (1) petitioner had not proved that this material breach of its leases "caused" it any injury and (2) Congress had repealed the statute after petitioner filed suit asserting material breach?

PARTIES TO THE PROCEEDING AND AMENDED RULE 29.6 DISCLOSURE

The following were parties to the proceeding in the court of appeals: The United States, Mobil Oil Exploration & Producing Southeast, Inc., and Marathon Oil Company.

All of the stock of Mobil Oil Exploration & Producing Southeast, Inc., is owned by its immediate parent, Mobil Exploration & Producing North America Inc. All of the stock of Mobil Exploration & Producing North America Inc. is owned by Mobil Corporation, and all of the stock of Mobil Corporation is, in turn, owned by ExxonMobil Corporation, a publicly held company.

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BRIEF OF PETITIONER
MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

OPINIONS BELOW

The initial opinion of the court of appeals is reported at 158 F.3d 1253. Petition Appendix ("Pet. App.") 22a. The revised opinion of the court of appeals is reported at 177 F.3d 331. Pet. App. 1a. The order of the court of appeals granting the petition for rehearing for the limited purpose of revising the court's initial opinion and denying the suggestion of Mobil Oil Exploration & Producing Southeast, Inc. ("Mobil") for rehearing in banc is also reported at 177 F.3d 331. Pet. App. 94a. The April 1, 1996, opinion of the United States Court of Federal Claims, which was reversed by the court of appeals, is reported at 35 Fed. Cl. 309. Pet. App. 40a.

JURISDICTION

The decision of the court of appeals that was the subject of the petition for a writ of certiorari was entered May 13, 1999. That decision revised the court of appeals' October 15, 1998, opinion pursuant to a timely petition for rehearing filed on November 25, 1998. The petition for a writ of certiorari was filed on August 10, 1999, and granted on November 15, 1999. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, and of the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555 (1990), *repealed by* Pub. L. No. 104-134, 110 Stat. 1321-177 (1996), appear in the Addendum to this brief.

STATEMENT OF THE CASE

Mobil and Marathon Oil Company ("Marathon"), petitioner in No. 99-253, each paid the United States more than $78 million in 1981 to acquire one-third interests in five oil and gas leases on the Outer Continental Shelf ("OCS") offshore North Carolina.[1] Fed. Cir. App. 180-81, 183-84. In 1990, Congress enacted the OBPA, which the Court of Federal Claims found "compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving a rise to 'total breach.'" Pet. App. 71a. The Federal Circuit held that, notwithstanding this "find[ing]," Mobil and Marathon were not entitled to restitution of the monies that they had paid to the Government for their leases because they had not proved that the OBPA, prior to its 1996 repeal, was the exclusive "cause" of their inability to explore the oil and gas resources on the North Carolina OCS.

The Facts Giving Rise To This Case

The OCSLA authorizes the United States Department of the Interior ("DOI") to sell leases that "*entitle* the lessee [*inter alia*] to explore [for] ... oil and gas" on the OCS, subject only to the lessee's due diligence. 43 U.S.C. § 1337(b)(4) (emphasis added). Section 1 of Mobil's and Marathon's leases provides that they are issued "pursuant to" and "subject to" the OCSLA. OCS Lease § 1, Marathon Pet. App. 175a. Thus, consistent with § 1337(b)(4), the leases give "the lessee the exclusive right and privilege to drill for, develop, and produce oil and gas resources ... in the submerged lands of the [OCS]." OCS Lease § 2.

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[1] Amerada-Hess Corporation, which settled its claims against the United States, *see* p. 13 n.12, *infra*, held the remaining one-third interest in the five leases.

Before conducting a sale of OCS leases, DOI assesses all the environmental impacts that are expected following the sale, as required by the OCSLA, 43 U.S.C. § 1346(a), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. Following such an assessment, DOI conducted a lease sale in August 1981 at which Mobil and Marathon bought their interests in the five North Carolina OCS leases. Fed. Cir. App. 180-81, 183-84. In total, the Government collected more than $350 million in bonus payments at that sale. *Id*. at 186.[2] The leases purchased by Mobil and Marathon have 10-year primary terms and are extended for as "long thereafter as oil or gas is produced ... in paying quantities." OCS Lease § 3, Marathon Pet. App. 176a.

The first step toward oil and gas production under an OCS lease is the submission to DOI of a plan of exploration ("POE"). Under OCSLA § 1340(c)(1), DOI "*shall*" approve a POE within 30 days after it is submitted, unless the proposed activities (1) "would probably cause serious harm or damage" to the environment, *see* OCSLA § 1334(a)(2), and (2) those activities cannot be modified to avoid such harm or damage. In these circumstances, which have *never* occurred in the history of the OCS leasing program, J.A. 176, DOI may cancel the lease and pay the owner the compensation specified in OSCLA § 1334(a)(2)(C) – *i.e.* the lesser of compensation for all expenditures on the leases with

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[2] *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981) (upholding DOI's front-end cash bonus system for issuing OCS leases). Under the OCS leasing program (1953-present), the Government has received more than $60 billion in up-front bonuses alone. *See* U.S. Department of the Interior Minerals Management Service, Mineral Revenues 1998, at 51 tbl.20 (1999) (visited Dec. 7, 1999) <http://www.rmp.mms.gov/library/statroom/PDFDocs/mrr98fin.pdf>. The Government has also received $61.5 billion in royalties and $1.7 billion in rents over the life of the program. *See id*. at 35, 48-49, tbls.13 & 18.

interest or the fair market value of the leases. As the Government has conceded,[3] the 30-day period for POE approval means that DOI cannot undertake new environmental studies to decide whether to approve a POE. Moreover, OCSLA § 1346(d) requires DOI to base its decision on the information that is "available" at the time of its POE decision. *See also* Marathon Pet. App. 201a.[4]

Under OCSLA § 1340(c) and § 1 of its leases, *see* p. 2, *supra*, Mobil was entitled to have a POE approved within 30 days. However, in 1989, acting on behalf of Marathon and six other companies holding North Carolina OCS leases, Mobil agreed with DOI and the State to submit a "draft" POE for what would have been the first exploratory well offshore North Carolina in order to give DOI an opportunity to prepare an analysis of the environmental impacts associated with the proposed well. J.A. 79-85. The *2000-page* Environmental Report produced by DOI in June 1990 constitutes, in DOI's own words, "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program." J.A. 179. After reviewing that report, DOI determined that Mobil's proposed exploration would not result in any significant environmental impacts. J.A. 139-40, 179. Accordingly, Mobil's POE was deemed to have "complied in all respects with [DOI] regulations ... governing [POEs]," and "[t]he Plan, together with its supporting information, [was] deemed to be approvable in all respects." Marathon Pet. App. 194a.

However, on August 18, 1990, the day before Mobil submitted its "final" POE to DOI, Congress enacted the OBPA. That Act, without amending the OCSLA -- and, indeed, being directed solely at the North Carolina OCS leases – prohibited DOI from approving any POE, POD, or permit to drill until the later of October 1, 1991, or 45 days of continuous congressional session following the Secretary's submission to Congress of a certificate that he had received a report from the Environmental Sciences Review Panel established by the OBPA and had concluded that sufficient information was available to allow him to carry out his responsibilities under the OCSLA.

The legislative record clearly reveals the intent underlying the OBPA. Prior to 1990, congressional appropriations moratoria had prohibited exploration on OCS leases offshore Florida and Alaska.[5] In June 1990, President

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[3] *See* Letter of February 28, 1990, from Michael Deland, Chairman of the Council on Environmental Quality to Rep. Walter Jones (Exh. 6 to Third Party Plaintiff's Motion for Partial Summary Judgment, filed April 12, 1994).

[4] If exploration is successful, lessees submit plans of development ("PODs") before proceeding with development and production of oil or gas. DOI may disapprove a POD, *inter alia*, if development and production "would probably cause serious harm or damage ... to the marine, coastal or human environments." OCSLA § 1351(h)(1)(D). If DOI disapproves a POD for this reason and it cannot be modified to avoid such risk of harm, DOI must ultimately cancel the lease and pay compensation to the lessee. OCSLA § 1351(h)(2)(C).

[5] *See, e.g.*, Pub. L. No. 100-46, § 110, 102 Stat. 1774, 1801 (1988) (Florida); Pub. L. No. 101-121, § 111, 103 Stat. 701, 702 (1989) (Alaska). The Florida and Alaska moratoria prompted the filing of claims by two other Mobil affiliates, as well as other companies that were originally plaintiffs in this litigation. Before the issues raised in those claims were decided, the Government paid nine of those plaintiffs $175 million, representing more than 100% of the bonuses and rentals that they had paid for their leases, in return for cancellation of their OCS leases. Fed. Cir. App. 973. The Government also paid Conoco Inc. $16.9 million to resolve its Alaska, Florida, and North Carolina claims, *id.* at 982, and it settled all of the claims of Shell Oil Company subsidiaries for undisclosed consideration, *id.* at 986.

Bush directed DOI to "[b]egin cancellation of *existing* leases off Florida" and to compensate the leaseholders by implementing a "joint federal-state buy-back" of those leases. J.A. 100. Representative Walter Jones of North Carolina, then Chairman of the House Merchant Marine and Fisheries Committee, vigorously protested the omission of the North Carolina OCS from the President's "moratorium," J.A. 102, as did North Carolina's Governor, J.A. 104. However, in July 1990, the House Appropriations Subcommittee rejected Rep. Jones' request for a ban on exploration offshore North Carolina, like those imposed on Florida and Alaska leases.

In response, Rep. Jones "managed to wrangle" the OBPA into the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*, over which his committee had jurisdiction. 136 Cong. Rec. 22,281 (1990) (Rep. Studds); *see also* id. at 22,275 (Rep. Regula) ("[The OBPA] was not in the House bill, was not in the Senate bill, was not within in the scope of the conference. It was simply added."); *id.* at 21,726 (1990) (Sen. Dole) (observing that the bill "includes a last minute moratorium on a promising lease in the Outer Continental Shelf").

Rep. Jones and the OBPA's other supporters made clear that they intended to achieve for North Carolina a "moratorium" like those that Congress had adopted for Florida and Alaska. *See, e.g.*, H.R. No. 101-653, 101st Cong., 2d Sess. 163 (1990) (Conf. Report) (describing the OBPA as a "moratorium"). In successfully opposing a separate floor vote on the OBPA, Rep. Jones stated that "in his offshore moratoria proposal, the President has forgotten about North Carolina. Well, I have not." 136 Cong. Rec. 22,275 (1990). Representative Rose of North Carolina likewise explained the purpose of the OBPA:

> Governor Martin . . . was horrified when the President stopped offshore drilling off the coast of ... Florida and left North Carolina out. And so he ... wrote to Mr. Jones, and Mr. Jones did exactly what [Governor Martin] asked him to do, he put [the OBPA] in this legislation.

Id. at 22,277 (Rep. Rose); *see also id.* at 22,272 (Rep. Miller) (describing the OBPA as a "moratorium"); *id.* at 22,278 (Rep. Young) (same); *id.* at 22,279 (Rep. Lagomarsino) (same); J.A. 113 (DOI Secretary Lujan denouncing the OBPA as a "*de facto* moratorium on any exploratory activity").

The legislative record also makes clear that the OBPA was aimed specifically at Mobil's proposed exploratory well:

> Although encompassing the entire area offshore the State of North Carolina, the [OBPA] essentially addresses the proposal by the Mobil Oil Corporation and seven partners to drill an exploratory well about 40 miles off Cape Hatteras.

H.R. No. 101-653, 101st Cong., 2d Sess. 161 (1990) (Conf. Report); *see also* OBPA § 6003(b)(7) (referring by name to DOI's June 1990 Environmental Report prepared pursuant to an agreement with "the Mobil Oil Company"); 136 Cong. Rec. 22,275 (Rep. Regula noting that the "real issue" underlying the OBPA was Mobil's proposed well).

In these circumstances, it is hardly surprising that DOI Assistant Secretary O'Neal, the official with direct responsibility for the OCS program, described the OBPA as an act of "bad faith" that had "no scientific basis" and was inconsistent with the terms of the North Carolina OCS leases. J.A. 182.

Application Of The OBPA

Although OBPA § 6003(e)(2) required the newly established Review Panel to submit a report to the Secretary by February 19, 1991, that report was not completed until January 22, 1992. J.A. 149. Moreover, contrary to the OBPA, the panel did not focus on the Secretary's responsibilities under the OCSLA regarding exploration. For example, the panel recommended extensive studies focusing on the impacts of onshore development, even though approval of the Mobil POE could not cause such impacts. J.A. 158-60.[6]

Following receipt of the Panel's report, Secretary Lujan certified on April 2, 1992, that "the information that currently exists is adequate to allow me to make a reasoned decision about the activities presently proposed [*i.e.*, the Mobil POE] to take place offshore North Carolina." Marathon Pet. App. 201a. Despite this unqualified conclusion, the Secretary refused to allow drilling of even the single well proposed in Mobil's POE until the completion of all the studies recommended by the Panel. *Id.* at 415. The last of those studies was not completed until July 1994. J.A. 194.

Moreover, Secretary Lujan's April 1992 decision dealt only with "the first [Mobil] exploratory well." Marathon Pet. App. 201a. DOI estimated that as many as

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[6] Secretary Lujan later recognized in his April 2, 1992, report to Congress under the OBPA that the Panel's "definition of adequacy [of environmental information] ... was far more restrictive and narrow than [his] charge under the [OCSLA]"; he also acknowledged that "[t]he OCSLA requires that the timing and location of exploration ... be based on a consideration of existing information ...." Marathon Pet. App. 201a.

eight additional delineation wells would be required just to determine the feasibility of production, and many more wells would have been necessary to produce the underlying oil or gas. J.A. 55. The OBPA Panel had determined that additional studies would be required before deciding whether to permit *any* of these additional wells, Marathon Pet. App. 198a-204a, and the Secretary told Congress that further studies would "not begin in earnest prior to reviewing the initial exploration drilling," *id.* at 201a-202a. Accordingly, the Government conceded below, *see* Federal Circuit Brief at 18, 23, 29-30, that after the Secretary's April 1992 certification the OBPA continued to bar all of these subsequent exploration and development-and-production activities.

After the enactment of the OBPA, Mobil faced another potential barrier to its exploration well based on the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 *et seq*. Pursuant to § 1456(c)(3)(B), North Carolina on November 19, 1990, objected to Mobil's exploratory drilling on the ground that it would not be consistent with the State's coastal management program. J.A. 141.[7] This objection was based in large part upon the OBPA's "findings" that there were insufficient environmental studies to proceed with drilling. J.A. 147. Under the CZMA, DOI was thus barred from issuing the drilling permit contemplated by Mobil's POE, unless Mobil successfully appealed to the Secretary of

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[7] On July 17, 1990, North Carolina also objected to Mobil's application to EPA for a permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1311, for the discharges into ocean waters associated with exploration. J.A. 106. Unlike the State's later objection to Mobil's POE, North Carolina's objection to the CWA permit would not have barred exploratory drilling. *See* J.A. 331 (discussing the State's proposal for a "no discharge" approach contemplating the barging of byproducts and wastes to shore).

Commerce or amended its POE to achieve consistency by conducting the additional studies demanded by North Carolina.[8] On September 2, 1994, the Secretary of Commerce rejected Mobil's appeal. The Secretary's decision, like North Carolina's, was based largely on the OBPA. *See, e.g.*, J.A. 224, 227, 232, 239, 244, 247.[9]

Proceedings In The Court Of Federal Claims

Confronted with Secretary Lujan's April 1992 decision interpreting the OBPA as requiring years of additional studies not only for the first exploration well offshore North Carolina, but also for *every* subsequent exploration, delineation, and production well, Mobil and all the other North Carolina OCS lessees filed suit under 28 U.S.C. § 1491 in the United States Court of Federal Claims. They alleged, *inter alia*, that the enactment and application of the OBPA constituted a material breach by anticipatory repudiation of their leases that entitled them to restitution of all the monies that they had paid to acquire and maintain the leases. *See* Mobil Complaint ¶ 1. The Government defended

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8 *See Secretary of the Interior v. California*, 464 U.S. 312, 339 (1984) (discussing the application of the CZMA to OCS exploration activities).

9 Mobil and the other lessees filed an action in District Court challenging the Secretary of Commerce's rejection of their CZMA appeal. In early 1996, the District Court remanded the case to the Secretary of Commerce for a determination whether the administrative record should be reopened to receive the two completed studies required by the OBPA scientific review panel. *Mobil Oil Exploration and Producing Southeast, Inc. v. Secretary of Commerce*, Civ. No. 95-93 SSH (D.D.C.), Order filed March 11, 1996. On December 8, 1999, almost four years after the district court's remand – but only three weeks after this Court granted certiorari in this case – the Secretary of Commerce issued a decision refusing to reopen the record.

principally on the ground that under the terms of the OCS leases, as construed pursuant to the unmistakability and sovereign acts doctrines,[10] the OBPA could be applied to their leases even though it was enacted nine years after they were issued.

On April 1, 1996, the Court of Federal Claims granted summary judgment for Mobil and the other plaintiffs on their material breach theory. Pet. App. 40a. The court rejected the Government's principal argument that § 1 of the leases – making them "subject to" the OCSLA and "all other applicable statutes and regulations" – allowed the Government through future legislation, like the OBPA, to impose new restrictions on OCS activities:

> [T]he lease contracts here at issue cannot be construed to allow for such drastic unilateral interference by the government, through passage of highly restrictive legislation, the OBPA, with the lessees' bargained for rights of exploitation.
>
> * * *
>
> Moreover, common sense suggests that no sophisticated oil and gas company . . . would knowingly agree to pay the huge, upfront considerations here involved for such tenuous and unilaterally interruptible drilling rights.

Pet. App. 62a.

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10 *See generally United States v. Winstar Corp.*, 518 U.S. 839 (1996).

Having determined that the OBPA was an "external factor" that "cannot be read into [Mobil's] unambiguous lease terms," Pet. App. 63a, the court concluded that the OBPA constituted an anticipatory repudiation and material breach of the companies' OCS leases:

> Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore, the court ... finds that compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

Pet. App. 71a; *see also* Pet. App. 63a (OBPA "clearly reduce[d] the value and materially alter[ed] the structure and framework of plaintiffs' North Carolina lease acquisitions").

The Court of Federal Claims also found that the OBPA "was narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue." Pet. App 86a. It thus rejected the Government's argument under the sovereign acts doctrine, holding that the OBPA "was not an act of public, general applicability" but instead was "specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina." Pet. App. 91a.[11]

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[11] The Government paid so little attention to the CZMA in briefing and arguing summary judgment that the court did not directly address that statute. It did hold, however, that because the OBPA "legislatively barred [DOI] from performing," it was "not necessary for plaintiffs [even] to have actually submitted such (...continued)

Following additional proceedings regarding remedy, judgment was entered for Mobil in the amount of $78,257,565, J.A. 339 – restitution (without interest) of the bonus monies Mobil paid to the Government in 1981 to acquire its North Carolina leases.[12]

Proceedings In The Federal Circuit

The Government appealed to the Federal Circuit. However, in that court the Government abandoned its principal arguments based on its interpretation of the OCS leases, as well as the sovereign acts and unmistakability doctrines, thus conceding that the OBPA was targeted at and inconsistent with Mobil's lease rights. Instead, as the last of its three arguments, the Government contended that the OBPA could not sustain Mobil's claims of material breach and restitution because Mobil was independently barred by the CZMA from obtaining the drilling permit necessary to conduct the exploration contemplated by its POE. In advancing this argument, the Government did not contend that the repeal of the OBPA on April 26, 1996, nearly a month after the Court of Federal Claims' decision, could in

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exploration plans because it is clear defendant cannot and will not perform its end of the bargain as required by the OCSLA." Pet. App. 73a. Had Mobil simply filed suit without filing a POE or seeking permits from EPA under the CWA, the CZMA would never have come into play in this case.

[12] Judgment was similarly entered on behalf of Marathon. J.A. 340. At the time of the decision on liability, Mobil and Marathon were joined by their co-lessee Amerada-Hess and four other lessees. Ultimately, those companies dismissed their claims, while retaining their North Carolina OCS leases, pursuant to judgments that totalled $80.9 million, representing 50% of the bonuses and rentals that they paid for those leases. Fed. Cir. App. 965-66, 969-70.

any way relieve it from liability for the material breach declared by that court.[13]

On October 15, 1998, a majority of the Federal Circuit panel (Judges Plager and Schall, with Judge Newman dissenting) reversed the Court of Federal Claims' judgment. The panel majority expressly "agree[d]" with that court's "find[ing]" that the OBPA was inconsistent with Mobil's lease agreement. Pet. App. 31a. However, the court of appeals did not "dwell upon" the breach issue because it concluded that "the outcome of the case d[id] not turn on this issue." Pet. App. 31a.

Instead, the court of appeals rested its reversal exclusively upon the impact of the CZMA on Mobil's POE. Mistakenly characterizing Mobil's suit as seeking to recover "damages" for the "delay" in approving its POE precipitated by the OBPA, the panel majority held that the North Carolina's CZMA consistency objection was an independent "cause" of the delay and cited five cases holding that claims for "delay damages" should be rejected where there is an independent cause of delay not attributable to the acts of the defendant. Pet. App. 33a-34a. To further support its denial of "delay damages," the panel majority construed the OCS leases as placing an obligation upon Mobil to achieve CZMA consistency and as giving the Government the right to cancel such leases in the event that consistency is not achieved. Pet. App. 31a-32a, 37a. Finally, the panel majority relied upon a

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13 *See* 141 Cong. Rec. 26,033 (Sept. 21, 1995) ("The repeal [of the OBPA] is not intended to excuse the United States from the liabilities, if any, it has incurred to date nor to otherwise affect pending litigation."); *cf.* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any ... liability under such statute, unless the Repealing Act shall so expressly provide.").

provision of the OCSLA, 43 U.S.C. § 1351(h)(2), which denies compensation under that Act if a CZMA consistency objection bars approval of a POD for development and production, as opposed to exploration. Pet. App. 36a-37a.[14]

Mobil sought panel rehearing and suggested rehearing in banc. The petition pointed out that the court had erred in characterizing Mobil's suit for restitution as one for "delay damages." Mobil also argued that the court had misconstrued the relevant provisions of the OCS leases with respect to Mobil's purported obligation to achieve CZMA consistency, as well as the OCSLA with respect to the award of compensation where a CZMA consistency objection bars OCS exploration.[15]

On May 13, 1999, the panel majority (with Judge Rader replacing Judge Schall, who recused himself on rehearing) issued a revised opinion. Although continuing to "agree" with the trial court's finding that the OBPA could not be reconciled with the terms of Mobil's leases, Pet. App. 9a-10a, the court of appeals reaffirmed its decision to reverse. The court excised its erroneous discussion of delay damages and its misconstruction of the OCS leases and the OCSLA, while offering no new rationale for its decision.[16] Stripped of

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14 Judge Newman's dissent followed the lines of one of the arguments advanced by Mobil in its brief: that a CZMA consistency objection would not preclude the restitution sought by the companies since, at most, it raised an issue of impossibility of performance which under settled law would require restitution of their bonuses. Pet. App. 38a-39a.

15 As to the latter, Mobil showed that a CZMA consistency objection at the exploration stage is governed by OCSLA § 1340(c), which, unlike § 1351(h)(2), is silent regarding statutory compensation.

16 Judge Newman reiterated her dissent, albeit in more expansive terms. Pet. App. 17a-21a.

the underpinnings provided in its initial opinion, the panel majority's ultimate decision was expressed as follows:

> Lessees have not established that their inability to obtain secretarial approval of the POE and to undertake exploratory activity *was caused by the moratorium* rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. * * * The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's objections *resulted in a delay that preceded and extended throughout the period in which the OBPA was effective*.

Pet. App. 12a-13a (emphasis added). Accordingly, the rationale for the court of appeals' decision in this case rests upon two related propositions – (1) that Mobil had not established that the OBPA, as opposed to the CZMA, "caused" DOI to withhold approval of the POE and (2) that the OBPA's repeal during the pendency of North Carolina's CZMA objection absolved the Government from liability.

SUMMARY OF ARGUMENT

1. The Court of Federal Claims correctly found that the OBPA constituted an anticipatory repudiation of Mobil's OCS leases giving rise to "total breach." By enacting the OBPA, whose text and legislative history reveal was targeted specifically at Mobil's proposed exploratory well, the Government breached its duty under the leases to approve POEs, PODs, and other permits "pursuant to" and "subject to" the OCSLA. Because the new conditions imposed under the OBPA applied to *every* POE, POD, and drilling permit on

the North Carolina OCS through the life of the leases, the OBPA effected a wholesale restructuring of the bargain struck between the Government and Mobil in 1981.

2. Having expressly "agree[d]" with the Court of Federal Claims that the conditions imposed by the OBPA were inconsistent with the terms of Mobil's lease, the Federal Circuit did not question that restitution is an appropriate remedy for such an anticipatory repudiation. Instead, the Federal Circuit denied Mobil's claim to restitution on the ground that Mobil had not proved that the OBPA was the "cause" of its loss under the contract. The panel majority clearly erred in engrafting onto the law of restitution an unprecedented "causation" requirement.

a. The case law of this and other courts, as well as the black letter law reported by the *Restatement* and contract-law scholars, make plain that a party has an absolute right – without regard to "causation" – to obtain restitution following an anticipatory repudiation like the one here. This is in stark contrast to the role that causation plays in the expectation damages context, where recovery may be had only for losses that would not have occurred "but for" the breach.

b. Corollary rules of contract law further confirm the irrelevance of "causation" to restitution. It is settled that even a plaintiff who could not himself have performed – and thus could not have obtained expectation damages – may nonetheless obtain restitution, even though the plaintiff's own inability to perform would have "caused" its loss. Similarly, a plaintiff may obtain restitution even on what is, from the plaintiff's perspective, a losing contract, for example, where market forces – and not the defendant's breach – "cause" a plaintiff's loss.

c. The Federal Circuit's causation requirement is inconsistent with the policies and purposes of restitution. Unlike expectation damages, which are forward-looking (and thus entail a causation requirement), restitution is backward-looking and seeks to restore both parties to the position they occupied before the contract was made. Given restitution's backward-looking cast, it is irrelevant whether some external factor might later have frustrated Mobil's exploration, development and production plans under its leases.

3. The Federal Circuit's conclusion that the repeal of the OBPA in 1996 – four years after Mobil filed suit – absolves the Government of responsibility for its breach, is plainly wrong. Under settled law, by bringing suit in 1992, Mobil extinguished the Government's right to retract its repudiation.

4. The Federal Circuit's decision, if allowed to stand, would adversely affect government contracting. Not only would the decision undermine the integrity of thousands of existing government contracts involving tens of billions of dollars, it would also chill future government contracting by opening up opportunities for the Government to repudiate its agreements with impunity. The decision would therefore fundamentally undermine what this Court in *Winstar* described as "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies."

ARGUMENT

The Federal Circuit's rationale in denying Mobil the restitution that it sought based upon the enactment and application of the OBPA is summed up in the last sentence of the introductory paragraph of the court's opinion: "Because the moratorium legislation [the OBPA] was not the *operative cause* of [Mobil's and] Marathon's failure to obtain the

required permits, the judgment of the Court of Federal Claims is reversed." Pet. App. 2a (emphasis added). The court of appeals' reliance upon causation to defeat a claim of restitution is inconsistent with two fundamental contract-law principles that, taken together, control this case. First:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been ... a citizen.

The Sinking-Fund Cases, 99 U.S. (9 Otto) 700, 719 (1879). And second:

> It is an invariably true proposition that whenever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything he had done under it previously to the rescission.

Ankeny v. Clark, 148 U.S. 345, 353 (1893).

In 1981, the United States Government and Mobil entered into lease contracts whereby Mobil paid the Government more than $78 million for "the exclusive right and privilege to drill for, develop, and produce oil and gas resources" on terms and conditions "pursuant to" and "subject to" the OCSLA. In 1990, in enacting the OBPA, the Government anticipatorily repudiated its obligations under the leases by "impos[ing] severe, burdensome, new

conditions upon DOI's obligation[s] under OCSLA." Pet. App. 71a. Pursuant to *The Sinking-Fund Cases* and *Ankeny* and the common law principles that those cases embrace, Mobil is entitled to restitution of its bonus payment.

I. THE OBPA IMPOSED NEW CONDITIONS INCONSISTENT WITH THE TERMS OF MOBIL'S LEASES AND THEREBY REPUDIATED THOSE LEASES.

The Federal Circuit majority never questioned the Court of Federal Claims' express "find[ing]" that "the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.'" Pet. App. 71a. On the contrary, the Federal Circuit "agree[d]" that the new conditions imposed by the OBPA could not be reconciled with the terms of Mobil's leases. Pet. App. 9a-10a. In so concluding, both the Court of Federal Claims and the Federal Circuit followed settled law.

It is a fundamental precept of the common law of contracts that "language that under a fair reading 'amounts to a statement of intention not to perform except on conditions which go beyond the contract' constitutes a repudiation." *Restatement (Second) of Contracts* § 250 cmt. b (1981) (quoting Uniform Commercial Code § 2-610 cmt. 2).[17] This rule has been consistently applied by federal and state courts. *See, e.g., VanHaaren v. State Farm Mut. Auto. Ins. Co.*, 989 F.2d 1, 6 (1st Cir. 1993) ("A contracting party's insistence ... on preconditions to performance not stated in the contract,

[17] Government contracts are controlled by the federal common law of contracts, *see United States v. Allegheny County*, 322 U.S. 174, 183 (1944), which, in turn, is informed by "the principles of general contract law," *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

constitutes a breach by anticipatory repudiation."); *Placid Oil Co. v. Humphrey*, 244 F.2d 184, 188 (5th Cir. 1957) (same, where an oil lessor demanded new tests by a lessee); *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 358 S.E.2d 566, 569-70 (N.C. Ct. App. 1987) ("[I]f a party to the contract states that he cannot perform except on some condition which goes outside the terms of his contract then the statement will constitute a repudiation.").[18]

Mobil's leases were expressly issued "pursuant to" and "subject to" the OCSLA. *See* p. 2, *supra* (quoting OCS Lease § 1). In so incorporating the provisions of the OCSLA, the leases "obligat[ed]" DOI to "timely and fairly consider ... exploration plans properly submitted," Pet. App. 71a, because OCSLA § 1340(c)(1) commands that POEs like Mobil's "shall" be acted upon within 30 days, *see* p. 3, *supra* (quoting OCSLA § 1340(c)(1)). By withholding action on Mobil's POE in light of the new requirements of the OBPA, the Government refused "to perform except on conditions which [went] beyond the contract" and thereby repudiated the lease agreement. *Restatement (Second) of Contracts* § 250 cmt. b; *see also Ankeny*, 148 U.S. at 353 (holding that a party repudiates a contract where he "disable[s] himself from performing it by his own act"). Moreover, because the OBPA applied not only to Mobil's first POE, but also to *every* single POE (of which there could be many) and POD (of which there could be several), as well as to *every* other permit to drill associated with exploration, production, and development of oil or gas on the North Carolina OCS during the life of Mobil's leases, the Government's anticipatory

[18] *Accord, e.g., Unique Sys., Inc. v. Zotos Int'l, Inc.*, 622 F.2d 373, 376-77 (8th Cir. 1980); *Chamberlin v. Puckett Constr.*, 921 P.2d 1237, 1240 (Mont. 1996); *Koski v. Eyles*, 440 A.2d 317, 319 (Conn. Sup. Ct. 1981).

repudiation affected its entire contractual relationship with Mobil.

Finally, the extraordinary nature of the United States' breach in this case is demonstrated by the fact that the OBPA on its face, *see, e.g.*, § 6003(b)(7) (referring to "the Mobil Oil Company" by name), and by its history, *see* pp. 5-7, *supra*, was unquestionably "designed to target" Mobil's lease rights. *See Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 2365 (1998); *see also Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. 1978) (denial of OCS drilling permits was not a "sovereign act" because it was "directed principally and primarily at plaintiff's contractual right"). By abandoning its argument under the sovereign acts doctrine following this Court's decision in *Winstar*, the Government conceded that the OBPA was not an act of general applicability but was instead, as the Court of Federal Claims found, "narrowly tailored to target" Mobil's leases, Pet. App. 86a, and "specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina," Pet. App. 91a.[19]

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[19] The Government's only argument contesting the Court of Federal Claims' finding of "material breach" is that the OBPA did not "go[] to the essence of the contract and defeat its object," Op. Cert. 12, because "at all times, petitioners were disabled from proceeding" by the CZMA, *id.* at 13. In this respect, the Government conflates the question of breach of contract and the causation of Mobil's damages associated with the OBPA, just like the Federal Circuit. *See* Pet. App. 16a ("[T]he OBPA was not the cause of [Mobil's and] Marathon's inability to obtain ... approvals for [the] proposed oil exploration, and there is no evidence of a breach of contract by the United States."). The only case cited by the Government in support of its material breach argument, *Sun Oil Co.*, 572 F.2d at 804-06, *see* Op. Cert. 13, involved delay damages, not claims for restitution based on material breach.

II. FOLLOWING THE GOVERNMENT'S ANTICIPATORY REPUDIATION, MOBIL HAD AN ABSOLUTE RIGHT – WITHOUT REGARD TO CAUSATION – TO RESCIND THE CONTRACT AND OBTAIN RESTITUTION OF ITS BONUS PAYMENTS.

The Federal Circuit did not and could not question that restitution is, as a general matter, an appropriate remedy for a material breach by anticipatory repudiation. *See e.g., Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548 (Fed. Cir. 1992) (granting restitution of up-front payments for timber rights following the enactment of a new statute that prevented access to timber lands). Instead, the court of appeals held that Mobil was not entitled to such relief because it had "not established that [its] inability to obtain secretarial approval of the POE and to undertake exploratory activity was *caused* by the [OBPA] moratorium rather than by the fact that [it was] unable to provide the necessary state concurrence to [its] certification of CZMA compliance." Pet. App. 12a (emphasis added).[20] The Federal Circuit's reliance on North Carolina's objection as an independent and

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[20] The Federal Circuit's emphasis on the CZMA as the "cause[]" of Mobil's loss permeates its opinion. *See, e.g.*, Pet. App. 2a, quoted at pp. 18-19, *supra*; Pet. App. 12a ("[T]he OBPA essentially *had no effect* upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification ....") (emphasis added); Pet. App. 13a ("[A]ppellees' failure to overcome North Carolina's objections *resulted* in a delay that preceded and extended throughout the period in which the OBPA was effective.") (emphasis added).

supervening "cause[]" of Mobil's loss confounds clearly established law.[21]

A. Pursuant To Black Letter Law Embraced By This Court, Mobil Had An Absolute Right To Obtain Restitution Following The Government's Anticipatory Repudiation.

The Federal Circuit's focus on causation would have been appropriate if Mobil were seeking "delay damages," as the panel majority mistakenly believed in its initial opinion. Pet. App. 33a-34a.[22] But as Mobil pointed out in its rehearing petition in the Federal Circuit and as the panel majority effectively acknowledged by amending its opinion on rehearing, Mobil was *not* seeking delay damages based upon DOI's failure to act upon its POE as required by OCSLA § 1340(c). Instead, as Judge Newman correctly observed in her dissent below, Mobil "just wants its money back." Pet. App. 17a.

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[21] The court's holding that the CZMA was the actual "cause[]" of Mobil's "inability to obtain secretarial approval of the POE" and that the OBPA therefore "essentially had no effect" on Mobil's lease rights, *see* Pet. App. 11a-12a, also misunderstands the undisputed facts of the case. North Carolina's CZMA objection concerned only Mobil's POE for the first exploratory well offshore North Carolina and was based on matters – *i.e.*, the purported lack of studies for the first drilling activities offshore North Carolina – which were curable and would not have been the basis for North Carolina's objection to later POEs or PODs. J.A. 259-60 (denial of Mobil POE would not preclude the submission of other POEs). The OBPA, by contrast, fundamentally changed the terms and conditions of the leases as to *all* future drilling activities conducted by Mobil.

[22] Delay damages are a form of lost profits or "expectation" damages, seeking recovery for the added costs or lost revenues caused by the delay. 5 John C. McBride & Thomas J. Touhey, *Government Contracts*, § 37A.10 at 37A-1 (1998).

It is axiomatic that "on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party." *Restatement (Second) of Contracts* § 373; *accord Restatement of Restitution* § 108(a) (1937) ("A person who has conferred a benefit upon another in the performance of a contract or bargain with the other which the other has failed to perform is entitled to restitution … if the other has committed a material breach of contract."); 5 Arthur L. Corbin, *Corbin on Contracts* § 1104, at 560 (1951) ("In the case of a repudiation there is no doubt that the injured party [may obtain] restitution of such value as he may have already conferred upon the repudiator."); II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.20, at 527 n.3 (2d ed. 1998) ("It is … clear that an anticipatory repudiation gives the injured party an immediate claim to restitution.").

This Court has long recognized this fundamental principle. Even before *Ankeny v. Clark*, 148 U.S. at 353, in which a unanimous Court held it to be "an invariably true proposition" that one party's "refus[al] to perform" gives the other party "a right to elect to rescind" and "immediately sue on a quantum meruit for anything he had done under it previously to the rescission," this Court decided *Nash v. Towne*, 72 U.S. (5 Wall.) 689, 701-02 (1867):

> Where the seller of goods received the purchase-money at the agreed price, and subsequently refused to deliver the goods … it was held at a very early period that an action for money had and received would lie to recover back the money, and it has never been heard in a court of justice since that decision that there was any doubt of its correctness.

Other federal courts – including the Federal Circuit, *see Stone Forest Indus., Inc.*, 973 F.2d at 1550 – have likewise affirmed the right of an injured party to respond to a

repudiation by rescinding and obtaining restitution.[23] Indeed, cases like this, in which a party "has paid part or all of the price in advance for a performance that is not forthcoming," are "the clearest case[s] for restitution." III Farnsworth, *supra*, § 12.20, at 325; *see also* Frederic C. Woodward, *The Law of Quasi-Contracts* §262, at 412 (1913) ("[Restitution] has been invoked most frequently in the recovery of money paid.").

Departing from this unbroken line of established authority, the panel majority concluded that North Carolina's CZMA consistency objection was an independent and supervening "cause" of Mobil's loss that extinguished Mobil's right to restitution. The panel's reliance on the concept of causation was misplaced. Of course, a party seeking expectation damages is "limited to damages based on his actual loss *caused* by the breach." *Restatement (Second) of Contracts* § 347 cmt. e (emphasis added). "Recovery can be had only for loss that would not have occurred *but for* the breach." *Id.* (emphasis added). *See generally Hercules, Inc. v. United States*, 24 F.3d 188, 197 (Fed. Cir. 1994) (holding that, in a suit for expectation damages, a breach of contract plaintiff must show that its "damages were caused by the breach"), *aff'd*, 516 U.S. 417 (1996).

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23 *See, e.g., Elyea v. RCA Victor Co.*, 79 F.2d 759, 760 (5th Cir. 1935) (applying federal common law in the pre-*Erie* era); *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 490 (10th Cir. 1930) (same); *United Press Ass'n v. National Newspaper Ass'n*, 237 F. 547, 553 (8th Cir. 1916) (same). *See also Lee v. Foote*, 481 A.2d 484, 485-86 & nn. 3, 6 (D.C. 1984) (collecting state court decisions from numerous jurisdictions and holding that "[w]hen an express contract has been repudiated or materially breached by the defendant, restitution for the value of the non-breaching party's performance is available as an alternative to an action for damages on the contract").

But the question whether, in addition to the OBPA, the CZMA might also have prevented Mobil from ultimately realizing the full benefit of its lease agreement is irrelevant to Mobil's claim for *restitution*. Again, *Ankeny v. Clark*, 148 U.S. at 352 (emphasis added), is dispositive:

> [I]t seems plain that the plaintiff had a right to treat the contract as at an end, and to bring an action to recover the value of the wheat he had delivered to the defendant, and such other damages as he might have suffered by reason of that failure of the latter to perform his part of the contract; *and, a fortiori, that he might waive any demand for consequential damages, and confine his claim to a demand for the value of the wheat.*

Contract law scholars have likewise long affirmed that restitution relief is not concerned with "the damage suffered by the plaintiff *because of* the defendant's breach of contract," and that, in fact, "the damage suffered by the plaintiff is immaterial" to the restitution calculus, "the question being, not what the plaintiff suffered, but what did he give to the defendant in expectation of the performance of the contract by the defendant?" William A. Keener, *Treatise on the Law of Quasi-Contracts* 299 (1893) (emphasis added).

Given these clear statements of the irrelevance of causation to restitution relief, it is not surprising that none of the modern formulations of the rescission-and-restitution rule so much as hints that an aggrieved party must show that the breaching party's repudiation "caused" its loss. To the contrary, all make clear that the innocent party's right to rescind the contract and obtain restitution is absolute. *See, e.g., Restatement (Second) of Contracts* § 373 (stating that upon a repudiation an injured party is "entitled" to restitution of "any" benefit conferred); 5 Corbin, *supra*, § 1104, at 560

(stating that there is "no doubt" that a party may obtain restitution on a repudiation); II Farnsworth, *supra*, § 820, at 527 n.3 (stating that it is "clear" that a repudiation gives the injured party "an immediate claim to restitution").[24]

Nor is it surprising that recent federal cases similarly confirm that causation is irrelevant to claims for rescission and restitution. For example, in *Far West Federal Bank, S.B. v. OTS*, 119 F.3d 1358 (9th Cir. 1997), a group of investors agreed to recapitalize a failing thrift based on certain regulatory forbearances set forth in an agreement with the Federal Home Loan Bank Board. Congress later enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), which mandated regulatory action inconsistent with that agreement. The investors sued, seeking rescission of the agreement and restitution. In urging reversal on appeal of the district court's judgment for the investors, the Government argued that FIRREA had not caused the investors any economic harm because an injunction had "effectively shielded" them from "whatever adverse impact [they] might otherwise have suffered from FIRREA." *Far West*, 119 F.3d at 1365. The Ninth Circuit affirmed the district court, declaring that the Government's argument that FIRREA had not actually caused Far West's losses "misses the point." *Id.*

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[24] *Compare, e.g.*, III Farnsworth, *supra*, § 12.1, at 148-51 (discussing the "difficult problems of causation" posed by the expectation remedy), 3 Dan B. Dobbs, *Dobbs' Law of Remedies* § 12.4(2), at 65-69 (2d ed. 1993) (same), *and* 5 Corbin, *supra*, §§ 992, 997-1028, at 5-7, 19-175 (same), *with, e.g.*, III Farnsworth, *supra*, § 12.1, at 152-53 (discussing restitution relief without mentioning causation), *and* 3 Dobbs, *supra*, § 12.7(1), at 159-63 (same), and 5 Corbin, *supra*, § 996, 1102-1121, at 15-19, 548-652 (same).

> At the moment OTS announced its intention to impose FIRREA regulations on Far West, the Government repudiated the Conversion Agreement. Following repudiation, the Investors had the *absolute right* to cease their own performance and to obtain rescission and restitution.

Id. (emphasis added). Continuing, the Ninth Circuit reiterated that an injured party seeking restitution simply is not required to demonstrate that the breaching party's repudiation actually caused its losses: "FDIC's argument implies that the Investors would have to prove that they suffered consequential damages (*e.g.*, loss of their investment) in order to sue for breach. There is simply no basis in contract law for this proposition." *Id.*

B. Corollary Principles Of Contract Law Confirm That Causation Is Irrelevant To Claims For Rescission And Restitution.

In contract law, principles of causation are "often expressed in corollary rules rather than directly." 3 Dobbs, *supra*, § 12.4(2), at 68-69. Two such "corollary rules" further confirm the irrelevance of causation to a claim for restitution.

First, courts have long recognized that the requirement that a breach-of-contract plaintiff suing for traditional expectation damages show that he is "ready, willing, and able" to perform has no application in the restitution context. As one court put it, although in a suit for expectation damages a plaintiff "must tender and prove his own readiness, willingness, and ability to perform," a party seeking restitution need not make such a showing; rather, in an "action to rescind and recover payments made on account of the purchase price *it is enough to show a breach by the*

seller." *Weintraub v. Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (Sup. Ct. 1962) (emphasis added). In other words, a contract "may be rescinded, and purchase money paid in advance ... may be recovered back on the failure of one party to perform, even though the [complaining] party could not have performed." *Bigler v. Morgan*, 77 N.Y. 312, 318-19 (1879); *accord* 4 Corbin, *supra*, § 978, at 928 ("If the plaintiff could not have performed in any case, he will not be given damages for the defendant's failure to perform .... The rule is not quite the same with respect to the right to restitution of money paid or of the value of other benefits under the contract."). Thus, even where the complaining party's own inability to perform would have independently "caused" its losses under a contract, it is not barred from obtaining restitution of monies paid upon the breaching party's repudiation.

Second, where a defendant breaches what is, from the plaintiff's perspective, a losing contract, such that the plaintiff's expectation interest is zero, courts nonetheless allow the plaintiff to obtain restitution. The *Restatement (Second) of Contracts* is illustrative:

> A contracts to sell a tract of land to B for $100,000. After B has made a part payment of $20,000, A wrongfully refuses to transfer title. B can recover the $20,000 in restitution. *The result is the same even if the market price of the land is only $70,000, so that performance would have been disadvantageous to B.*

Restatement (Second) of Contracts § 373 illus. 1 (based on *Nash v. Towne*, 72 U.S. (5 Wall.) 689) (emphasis added); *accord* III Farnsworth, *supra*, § 12.20, at 325-26 ("If the injured party has paid part or all of the price in advance for a performance that is not forthcoming, that party can get

restitution of what has been paid ... even in the face of the contention by the party in breach that, had the performance been rendered, its value ... would have been less than [that] price," citing the "venerable case" of *Bush v. Canfield*, 2 Conn. 485, 488 (1818)).

In the losing-contract situation, there is clearly an independent "cause" of the plaintiff's loss – for example, market forces that have, from the plaintiff's perspective, diminished or destroyed the value of the contract. Nonetheless, courts permit a losing-contract plaintiff to obtain restitution upon a defendant's breach. Indeed, the Federal Circuit's own decision in *Stone Forest*, 973 F.2d at 1553, recognized this principle in awarding restitution of monies paid upon the Government's repudiation of a timber contract, even though the trial court had found that the plaintiff had not sought "traditional breach of contract damages" because "it could prove none," *Stone Forest Indus., Inc. v. United States*, 22 Cl. Ct. 489, 494 & n.7 (1991). *See also Acme Process Equip. Co. v. United States*, 347 F.2d 509, 528 (Ct. Cl. 1965) (holding that a contractor was entitled to restitution notwithstanding the Government's contention that the contractor would have sustained huge losses had the contract been performed), *rev'd on other grounds*, 385 U.S. 138 (1966).

C. The Policies And Purposes Underlying Restitution Confirm That Causation Is Irrelevant To Claims For Rescission And Restitution.

The Federal Circuit's "no harm, no foul" causation approach fundamentally misconceives the nature of restitution. As noted above, causation *is* relevant to a breach of contract claim for traditional "expectation" damages. *See* p. 26, *supra*. Expectation damages are forward-looking; their object is to give the aggrieved party "the benefit of his

bargain," *Restatement (Second) of Contracts* § 347 cmt. a, and to put that party "in as good a position as he would have been in had the contract been performed, that is, had there been no breach," *id.* § 344 cmt. a. Hence, if some factor external to the contract – some independent "cause" – would have prevented the plaintiff from realizing any benefit under the contract, then the plaintiff's expectation interest, irrespective of the defendant's breach, is zero, and no expectation damages are due.

In holding that causation is likewise a prerequisite to a claim for restitution, the Federal Circuit either misapprehended or papered over a fundamental distinction between expectation damages and restitution relief. As Professor Woodward reported in his seminal treatise, one of the animating forces that drove early common law judges to permit breach-of-contract plaintiffs to elect restitution was a desire to *avoid* the difficult issues of causation that attended the expectation measure of damages. Quoting Lord Mansfield's famous proclamation that "I am a great friend of the action for money had and received; it is a very beneficial action, and founded on principles of eternal justice,"[25] Woodward observed that

> the probable reason for permitting an election [of restitution was] a feeling that the plaintiff had at least lost his money and that the return of his money was a simpler adjustment of rights than the assessment of the damages suffered by the plaintiff as a result of the refusal of the defendant to perform his contract.

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25 *Towers v. Barrett*, 99 Eng. Rep. 1014, 1015 (1786).

Woodward, *supra*, § 262, at 411-12. It is as clear today as it was in Mansfield's time that, unlike the expectation measure of damages, restitution does *not* "attempt[] to compensate [the injured party] for consequential harms." 5 Corbin, *supra*, § 1102, at 548; *accord Ankeny*, 148 U.S. at 352 (distinguishing between restitution relief and "consequential harms" that are "suffered by reason of" defendant's breach); *Far West*, 119 F.3d at 1365 (holding that a party seeking restitution need not show "that [he] suffered consequential damages").

Restitution serves the twin purposes of (1) restoring the contracting parties to the position they occupied before the contract was made and (2) preventing "unjust enrichment" by forcing the breaching party to disgorge benefits unlawfully obtained. *See* Corbin, *supra*, § 1107, at 573 ("[I]n enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and thus tend to put the injured party in as good a position as that occupied by him before the contract was made."). Neither of these purposes provides any role for "causation."

1. Restitution does not seek to put the parties in the position they would have been in had the contract been performed, but rather seeks to "place both of the parties in the position they had prior to entering into the transaction." John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 15.1, at 599 (4th ed. 1998); *see also Ballou v. Billings*, 136 Mass. 307, 309 (1884) (Holmes, J.) ("Rescission ... annihilates the contract, and puts the parties in the same position as if it had never been made."). Thus, the restitution remedy serves to "restor[e] ... the status quo ante as far as is practicable." 12 Samuel Williston, *A Treatise on the Law of Contracts* § 1455, at 20 (3d ed. Walter H.E. Jaeger, ed., 1968) (quoting *Alder v. Drudis*, 182 P.2d 195, 202 (Cal. 1947)); *see also Tull v. United States*, 481 U.S. 412, 424 (1987) (restitution is concerned with "restoring the status quo

and ordering the return of that which rightfully belongs to the purchaser or tenant") (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)). Put simply, restitution is "chiefly employed for the unwinding of contracts." John P. Dawson, *Unjust Enrichment* 112 (1951). Given restitution's focus on the time of contracting (here, 1981), it is irrelevant whether some impediment that arose after the contract was made might have frustrated Mobil's ability to explore for, develop, and produce oil and gas on its leases.

The Federal Circuit's opinion reveals its basic misunderstanding of this "contract unwinding" function of the restitution remedy. In denying Mobil's claim, the court observed that it found "no principled distinction" between a lessee whose "hopes for large rewards" are frustrated by a CZMA objection and a lessee "whose hopes are drowned by impossible weather, equipment failures, [or] financial setbacks." Pet. App. 15a. The panel majority's logic might have had some force if directed to a claim for expectation damages. (Indeed, the panel majority's reference to Mobil's "hopes for large rewards" reveals its misunderstanding of the nature of Mobil's claim.) But this case is not about Mobil's supposed "hopes for large rewards"; rather, it is about Mobil's right to reimbursement of the sum certain it paid the Government in 1981. And while "impossible weather" might have frustrated Mobil's *expectation* interest, it could not have affected in any way Mobil's $78 million *restitution* interest – its interest in being returned to the status quo ante, *i.e.*, the position it occupied in 1981, prior to the time of contracting.

2. Restitution also seeks "to prevent unjust enrichment of the party in breach." III Farnsworth, *supra*, § 12.19, at 319; *accord Restatement (Second) of Contracts* § 373 cmt. a (noting that the primary purpose of restitution is to "prevent the unjust enrichment of the [breaching] party"). Thus, restitution is not primarily concerned with the *loss* suffered by the *injured* party – it is concerned instead with

the *gain* unlawfully received by the *breaching* party. "[N]o principle in the law of restitution is more clear than this." *Rapaport v. United States Dep't of the Treasury*, 59 F.3d 212, 217 (D.C. Cir. 1995); *see also* Dobbs, *supra*, § 12.7(1), at 160 ("A damages award focuses on the victim's loss and seeks compensation (or partial compensation); the restitution award focuses on the breacher and seeks to prevent his unjust enrichment by forcing restitution of gains he received under the contract."); Keener, *supra*, at 299 ("[T]he damage suffered by the plaintiff is immaterial, the question being, not what has the plaintiff suffered, but what did he give to the defendant in expectation of the performance of the contract by the defendant?").

III. THE FEDERAL CIRCUIT ERRONEOUSLY CONCLUDED THAT THE REPEAL OF THE OBPA CURED THE GOVERNMENT'S BREACH.

As noted above, pp. 10, 16-17, 21, the OBPA introduced new and unanticipated regulatory hurdles not only for Mobil's first POE for the Manteo area, but also for *every* subsequent permit that Mobil would ever need to delineate oil and gas resources and ultimately to produce such resources and transport them to shore. Mobil argued below that North Carolina's CZMA objection pertained only to the first POE for the area and was based upon a purported lack of environmental studies which, once conducted, would clear the path for later exploration, development, and production. Accordingly, even if the CZMA objection were regarded as the cause of the delay inherent in obtaining approval of the first POE, it would not excuse the material breach caused by the OBPA.

The panel majority rejected Mobil's characterization of the OBPA as a "continuing open-ended prohibition of *any* exploration of the North Carolina OCS and *any* development

and production of oil and gas resources in that area," by observing that North Carolina's CZMA objection "resulted in a delay that preceded and extended throughout *the period in which the OBPA was effective*." App. 13a (emphasis added). This vital underpinning of the court of appeals' decision – that, in the light of the CZMA, the OBPA was not the exclusive cause of Mobil's inability to explore its leases – can only be understood as resting upon the premise that the 1996 repeal of the OBPA during the pendency of North Carolina's CZMA objection (but three-and-a-half years after Mobil filed suit) effectively nullified the anticipatory repudiation that arose with the enactment of the OBPA. This holding of the Federal Circuit, like its reliance on causation, defies settled law.[26]

It is, of course, true that "[t]he effect of a statement as constituting a repudiation … is nullified by a retraction of the statement …." *Restatement (Second) of Contracts* § 256. However, a retraction is effective only "if notification … comes to the attention of the injured party before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final." *Id.* Dispositive here, "[t]he bringing of a suit by the promisee for the anticipatory breach is one sort of reliance making retraction impossible." 4 Corbin, *supra*, § 980, at 931; *accord* 11 Williston, *supra*, § 1335, at 182-83 ("If … the contract has been totally rescinded, or an action has been brought … such withdrawal is ineffectual.").

Federal and state courts agree that by filing suit an injured party cuts off a breaching party's right to retract its anticipatory repudiation. *See, e.g.*, *United States v. Seacoast*

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[26] It also ignores the legislative history of the OBPA's repeal and 1 U.S.C. § 109. *See* p. 14 n.13, *supra*.

Gas Co., 204 F.2d 709, 711 (5th Cir. 1953) ("All that is required to close the door to repentance is definite action indicating that the anticipatory breach has been accepted as final, and this requisite can be supplied ... by the filing of a suit ...."); *Lake Erie Distribs., Inc. v. Martlet Importing Co.*, 634 N.Y.S.2d 599, 601 (App. Div. 1995) (same).

Mobil brought suit on October 28, 1992, claiming that the OBPA breached its leases. The OBPA was repealed on April 26, 1996. *See* p. 1, *supra*. That action was far too late to "cure" the anticipatory repudiation that occurred when the OBPA was enacted.

IV. THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH *WINSTAR*.

One of the principal concerns animating this Court's decision in *Winstar* was the need to protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883. That interest is best served, this Court concluded, by "treat[ing the Government] just like a private party in its contractual dealings," *id.* at 887 n.32, and requiring the "[p]unctilious fulfillment of contractual obligations," which is "essential to the maintenance of the credit of public as well as private debtors," *id.* at 884-85 (quoting *Lynch v. United States*, 292 U.S. 571, 580 (1934)) (internal quotation marks omitted). By contrast, as this Court recognized, a rule "expanding the Government's opportunities for contractual abrogation" will have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884.

This case presents the very dangers that this Court warned against in *Winstar*. The Federal Circuit's decision gives the Government a strong incentive to breach

agreements that become either politically unpopular or financially unprofitable because parties contracting with the Government are almost always subject to various forms of regulation. *Cf. Winstar*, 518 U.S. at 886 (rejecting a rule that would "compromise the Government's capacity as a reliable, straightforward contractor whenever the subject matter of a contract might be subject to subsequent regulation, *which is most if not all of the time*") (emphasis added). The decision below frees the Government, at its discretion, to take advantage of its regulated contracting partners by (1) restructuring and even repudiating its agreements, (2) offering as a post hoc rationalization for its action that some "other" statute or regulation (like the CZMA) served as an independent and supervening "cause" of the innocent parties losses, and (3) keeping any up-front payment, however substantial, that those parties might have paid as a precondition to contracting. The Federal Circuit's rule would therefore cast into doubt thousands of existing government contracts involving billions of dollars. *See* Pet. pp. 20-23.

In addition, the Government's ability under the Federal Circuit's unprecedented rule unilaterally to disturb settled property rights would give private parties a distinct disincentive to enter into *future* government contracts. As the Court of Federal Claims found,

> common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptible drilling rights.

Pet. App. 63a. To paraphrase this Court's decision in *Winstar*, "[i]njecting the opportunity for [causation] litigation into every [restitution] action would ... produce the untoward

result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself." *Winstar*, 518 U.S. at 884 (quoting *United States v. Bekins*, 304 U.S. 27, 51-52 (1938)).

CONCLUSION

For the reasons stated above, the judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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STATUTORY ADDENDUM

SEC. 6003. OUTER BANKS PROTECTION.

(a) SHORT TITLE.—This section may be cited as the "Outer Banks Protection Act".

(b) FINDINGS.—The Congress finds that—

(1) the Outer Banks of North Carolina is an area of exceptional environmental fragility and beauty;

(2) the annual economic benefits of commercial and recreational fishing activities to North Carolina, which could be adversely affected by oil or gas development offshore the State's coast, exceeds $1,000,000,000;

(3) the major industry in coastal North Carolina is tourism, which is subject to potentially significant disruption by offshore oil or gas development;

(4) the physical oceanographic characteristics of the area offshore North Carolina between Cape Hatteras and the mouth of the Chesapeake Bay are not well understood, being affected by Gulf Stream western boundary perturbations and accompanying warm filaments, warm and cold core rings which separate from the Gulf Stream, wind stress, outflow from the Chesapeake Bay, Gulf Stream meanders, and intrusions of Virginia coastal waters around and over the Diamond shoals;

(5) diverse and abundant fisheries resources occur in the western boundary area of the Gulf Stream offshore North Carolina, but little is understood of the complex ecological relationships between the life histories of those species and their physical, chemical, and biological environment;

(6) the environmental impact statements prepared for Outer Continental Shelf lease sales numbered 56 (1981) and 78 (1983) contain insufficient and outdated environmental information from which to make decisions on approval of additional oil and gas leasing, exploration, and development activities;

(7) the draft environmental report, dated November 1, 1989, and the preliminary final environmental report dated June 1, 1990, prepared pursuant to a July 14, 1989 memorandum of understanding between the State of North Carolina, the Department of the Interior, and the Mobil Oil Company, have not allayed concerns about the adequacy of the environmental information available to determine whether to proceed with additional offshore leasing, exploration, or development offshore North Carolina; and

(8) the National Research Council report entitled "The Adequacy of Environmental Information for Outer Continental Shelf Oil and Gas Decisions: Florida and California", issued in 1989, concluded that—

(A) information with respect to those States, which have received greater scrutiny than has North Carolina, is inadequate; and

(B) there are serious generic defects in the Minerals Management Service's methods of environmental analysis,

reinforcing concerns about the adequacy of the scientific and technical information which are the basis for a decision to lease additional tracts or approve an exploration plan offshore North Carolina, especially with respect to oceanographic, ecological, and socioeconomic information.

(c) PROHIBITION OF OIL AND GAS LEASING, EXPLORATION, AND DEVELOPMENT.—

(1) PROHIBITION.—The Secretary of the Interior shall not—

(A) conduct a lease sale;

(B) issue any new leases;

(C) approve any exploration plan;

(D) approve any development and production plan;

(E) approve any application for permit to drill; or

(F) permit any drilling,

for oil or gas under the Outer Continental Shelf Lands Act on any lands of the Outer Continental Shelf offshore North Carolina.

(2) BOUNDARIES.—For purposes of paragraph (1), the term "offshore North Carolina" means the area within the lateral seaward boundaries between areas offshore North Carolina and areas offshore—

(A) Virginia as provided in the joint resolution entitled "Joint resolution granting the consent of Congress to an agreement between the States of North Carolina and Virginia establishing their lateral seaward boundary" approved October 27, 1972 (86 Stat. 1298); and

(B) South Carolina as provided in the Act entitled "An Act granting the consent of Congress to the agreement between the States of North Carolina and South Carolina establishing their lateral seaward boundary" approved October 9, 1981 (95 Stat. 988).

(3) DURATION OF PROHIBITION.—

(A) IN GENERAL.—The prohibition under paragraph (1) shall remain in effect until the later of—

(i) October 1, 1991; or

(ii) 45 days of continuous session of the Congress after submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel under subsection (e)—

(I) certifying that the information available, including information acquired pursuant to subsection (d), is sufficient to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in paragraph (1); and

(II) including a detailed explanation of any differences between such certification and the findings and recommendations of the Environmental Sciences Review Panel under subsection (e), and a detailed justification of each such difference.

(B) CONTINUOUS SESSION OF CONGRESS.—In computing any 45-day period of continuous session of Congress under subparagraph (A)(ii)—

(i) continuity of session is broken only by an adjournment of the Congress sine die; and

(ii) the days on which either House of Congress is not in session because of an adjournment of more than 3 days to a day certain are excluded.

(d) ADDITIONAL ENVIRONMENTAL INFORMATION.—The Secretary of the Interior shall undertake ecological and socioeconomic studies, additional physical oceanographic studies, including actual field work and the correlation of existing data, and other additional environmental studies, to obtain sufficient information about all significant conditions, processes, and environments which influence, or may be influenced by, oil and gas leasing, exploration, and development activities offshore North Carolina to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1). During the time that the Environmental Sciences Review Panel established under subsection (e) is in existence, the Secretary of the Interior shall consult with such Panel in carrying out this subsection.

(e) ENVIRONMENTAL SCIENCES REVIEW PANEL.—

(1) ESTABLISHMENT AND MEMBERSHIP.—There shall be established an Environmental Sciences Review Panel, to consist of—

(A) 1 marine scientist selected by the Secretary of the Interior;

(B) 1 marine scientist selected by the Governor of North Carolina; and

(C) 1 person each from the disciplines of physical oceanography, ecology, and social science, to be selected jointly by the Secretary of the Interior and the Governor of North Carolina from a list of individuals nominated by the National Academy of Sciences.

(2) FUNCTIONS.—Not later than 6 months after the date of the enactment of this Act, the Environmental Sciences Review Panel shall—

(A) prepare and submit to the Secretary of the Interior findings and recommendations—

(i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1); and

(ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities; and

(B) consult with the Secretary of the Interior as provided in subsection (d).

(3) EXPENSES.—Each member of the Environmental Sciences Review Panel shall be reimbursed for actual travel expenses and shall receive per diem in lieu of subsistence for each day such member is engaged in the business of the Environmental Sciences Review Panel.

(4) TERMINATION.—The Environmental Sciences Review Panel shall be terminated after the

submission of all findings and recommendations required under paragraph (2)(A).

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary of the Interior to carry out this section not to exceed $500,000 for fiscal year 1991, to remain available until expended.

OUTER CONTINENTAL SHELF LANDS ACT.

43 U.S.C. § 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. * * * The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or

damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before September 18, 1978, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question ...

* * *

43 U.S.C. § 1337. Grant of leases by Secretary

(b) Terms and provisions of oil and gas leases

An oil and gas lease issued pursuant to this section shall—

* * *

(4) entitle the lessee to explore, develop, and produce the oil and gas contained within the lease

area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter ...

* * *

43 U.S.C. § 1340. Geological and geophysical explorations

(c) Plan approval; State concurrence; plan provisions

(1) Except as otherwise provided in this subchapter, prior to commencing exploration pursuant to any oil and gas lease issued or maintained under this subchapter, the holder thereof shall submit an exploration plan to the Secretary for approval. Such plan may apply to more than one lease held by a lessee in any one region of the outer Continental Shelf, or by a group of lessees acting under a unitization, pooling, or drilling agreement, and shall be approved by the Secretary if he finds that such plan is consistent with the provisions of this subchapter, regulations prescribed under this subchapter, including regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title, and the provisions of such lease. The Secretary shall require such modifications of such plan as are necessary to achieve such consistency. The Secretary shall approve such plan, as submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title, and (B) such proposed activity cannot be modified to avoid such condition. If the Secretary disapproves a plan under

the preceding sentence, he may, subject to section 1334(a)(2)(B) of this title, cancel such lease and the lessee shall be entitled to compensation in accordance with the regulations prescribed under section 1334(a)(2)(C)(i) or (ii) of this title.

(2) The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 1455 of Title 16, unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 1456(c)(3)(B)(i) or (ii) of Title 16, or the Secretary of Commerce makes the finding authorized by section 1456(c)(3)(B)(iii) of Title 16.

* * *

43 U.S.C. § 1346. Environmental studies

(a) Information for assessment and management of impacts on environment; time for study; impacts on marine biota from pollution or large spills

(1) The Secretary shall conduct a study of any area or region included in any oil and gas lease sale or other lease in order to establish information needed for assessment and management of environmental impacts on the human, marine, and coastal environments of the outer Continental Shelf and the coastal areas which may be affected by oil and gas or other mineral development in such area or region.

* * *

(d) Consideration of relevant environmental information in developing regulations, lease conditions and operating orders

The Secretary shall consider available relevant environmental information in making decisions (including those relating to exploration plans, drilling permits, and development and production plans), in developing appropriate regulations and lease conditions, and in issuing operating orders.

* * *

43 U.S.C. § 1351. Oil and gas development and production

(h) Approval, disapproval or modification of plan; reapplication; periodic review

* * *

* * *

(1)(B) if any of the activities described in detail in the plan for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 U.S.C.A. S 1456(c)(3)(B)(i) or (ii)] and the Secretary of Commerce does not make the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 U.S.C.A. S 1456(c)(3)(B)(iii)];

* * *

(2)(A) If a plan is disapproved—

* * *

(ii) under subparagraph (B) of paragraph (1) with respect to a lease issued after approval of a coastal zone management program pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1455), the lessee shall not be entitled to compensation because of such disapproval.

* * *

(C) Upon expiration of the five-year period described in subparagraph (B) of this paragraph, or, in the Secretary's discretion, at an earlier time upon request of a lessee, if the Secretary has not approved a plan, the Secretary shall cancel the lease and the lessee shall be entitled to receive compensation in accordance with section 1334(a)(2)(C) of this title. The Secretary may, at any time within the five-year period described in subparagraph (B) of this paragraph, require the lessee to submit a development and production plan for approval, disapproval, or modification. If the lessee fails to submit a required plan expeditiously and in good faith, the Secretary shall find that the lessee has not been duly diligent in pursuing his obligations under the lease, and shall immediately initiate procedures to cancel such lease, without compensation, under the provisions of section 1334(c) of this title.

OPPOSITION

BRIEF

Jan 28 2000

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

Nos. 99-244 and 99-253

In the Supreme Court of the United States

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

MARATHON OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, an asserted delay in the processing of a plan of exploration to perform environmental studies required by Congress was a material breach, or a repudiation, of federal offshore oil and gas leases.

2. Whether, in the circumstances of this case, the lessees waived any claim for rescission and restitution by continuing to require performance by the United States under the leases and by requesting and obtaining a rent-free extension of the leases commensurate with the asserted processing delay.

3. Whether, in the circumstances of this case, if a breach occurred that was not waived, the proper remedy is (i) a rent-free extension of the leases commensurate with the asserted processing delay or (ii) cancellation of the leases and restitution to the lessees of the payments made to secure the leases.

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In the Supreme Court of the United States

No. 99-244

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 99-253

MARATHON OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals upon panel rehearing (Pet. App. 3a-24a) is reported at 177 F.3d 1331.[1] The original opinion of the court of appeals that was subsequently withdrawn (Pet. App. 25a-43a) is reported at 158 F.3d 1253. The opinion of the Court of Federal Claims (Pet. App. 45a-99a) is reported at 35 Fed. Cl. 309.

[1] Unless otherwise noted, citations in this brief to "Pet. App." are to the appendices of the petition filed in No. 99-253.

JURISDICTION

The revised opinion and judgment of the court of appeals were entered on May 13, 1999 (Pet. App. 1a-24a). The petition for a writ of certiorari in No. 99-244 was filed on August 10, 1999. The petition for a writ of certiorari in No. 99-253 was filed on August 11, 1999. The petitions were granted on November 15, 1999. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451 *et seq.*, and the Outer Banks Protection Act (OBPA), Pub. L. No. 101-380, § 6003, 104 Stat. 555 (repealed 1996), appear at Pet. App. 100a-173a.

STATEMENT

Petitioners seek to recover from the United States the amounts they paid to obtain federal oil and gas leases on the outer continental shelf. The court of appeals correctly held that the facts of this case do not warrant the restitutionary relief that petitioners request. Petitioners failed to show any material breach by the United States of its obligation under the leases, or indeed any breach at all. The gravamen of their complaint is that a now-repealed intervening statute (the Outer Banks Protection Act) interfered with their rights under the leases, but the court of appeals correctly found that the Act resulted in no delay or alteration of any right petitioners otherwise would have enjoyed. Petitioners' claim for rescission is, in any event, foreclosed by their conduct electing to require further performance by the United States under the leases at substantial additional public expense.

I. Introduction And Statutory Background

1. This case involves the proper interaction of legislation that seeks, on the one hand, to preserve and protect the environment while, on the other hand, allowing development of certain natural resources on federal lands. The case arises in the context of federal oil and gas leases obtained by petitioners for submerged lands offshore of North Carolina. The offshore lands that petitioners have sought to develop are located at what is known as "The Point"—the area offshore of the Outer Banks at "the convergence of the Gulf Stream, continental slope, and shelf waters." J.A. 207. It "is an area characterized by unique physical and biological qualities." *Ibid.* "One of the East Coast's most important commercial and recreation fisheries is located in the waters overlying the proposed drill site." *Id.* at 225. This "area serves as an important migratory pathway and feeding habitat" for many fish species, and "an important food source * * * would be exposed to * * * wastes" resulting from drilling activities in this location. *Ibid.* The areas that petitioners have sought to develop are a "highly productive and ecologically unique area essential to the State's coastal zone." *Id.* at 207. The statutory context in which the leases for these areas were issued, and are to be administered, is highly protective of these important environmental interests.

2. The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, was enacted by Congress in 1953. The Outer Continental Shelf (OCS) is the submerged land beneath navigable waters on the Continental Shelf beginning seaward of the coastal waters within the jurisdiction of the individual States. See 43 U.S.C. 1301(a), (b), 1331(a). The States exercise jurisdiction over the waters and submerged lands within three miles of their coasts. See 43 U.S.C. 1311(a), (b), 1312. Pursuant to the OCSLA, the federal government exercises jurisdiction over the OCS and

ownership of the mineral resources found there. Pet. App. 4a; 43 U.S.C. 1332, 1333.

The OCSLA establishes a detailed framework for issuing mineral leases on the OCS by competitive bidding and for the approval of related activities under the leases. The Secretary of the Interior is authorized to administer the Act's provisions relating to the leasing of the OCS. 43 U.S.C. 1334, 1337, 1343-1346. The Secretary is also directed to promulgate rules and regulations to carry out those provisions—including regulations for the prevention of waste and for conservation of the natural resources of the OCS—and the statute specifies that such regulations shall apply to all operations conducted under any OCS lease. 43 U.S.C. 1334, 1337 (1994 & Supp. III 1997). The Act specifies that these regulations "shall include, but not be limited to," provisions—

> (1) *for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease* or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) *if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life)*, to property, to any mineral deposits (in areas leased or unleased), *or to the marine, coastal, or human environment*, * * * .

43 U.S.C. 1334(a) (emphasis added). The OCSLA also directs the Secretary to promulgate regulations providing for the extension of OCS leases in the event of their suspension. *Ibid.* The regulations promulgated by the Secretary under this statute provide that the leases granted under the Act may be suspended (and thereby extended without rent) in order (i) to conduct an environmental analysis; (ii) to comply

with the National Environmental Policy Act; (iii) to avoid threats of serious harm or damage to life, property or the environment; or (iv) to compensate for inordinate delays encountered by lessees in obtaining required permits or consents for lease operations. 30 C.F.R. 250.110(b) (formerly codified at 30 C.F.R. 250.10(b) (1997)).

The Secretary is required to conduct environmental analyses to ensure that serious harm or damage to the environment will not occur and is to offer OCS leases through a competitive bidding process. 43 U.S.C. 1337(a), 1346(a) (1994 & Supp. III 1997). An OCS lease does not grant the lessee an unfettered right to explore and develop the leased area. Instead, the lessee obtains a priority over others in submitting for federal approval plans for exploration, production, or development. *Secretary of the Interior* v. *California*, 464 U.S. 312, 317, 337 (1984); *Tribal Village of Akutan* v. *Hodel*, 869 F.2d 1185, 1187 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989). Before the lessee may actually explore and develop the leased area, numerous conditions must be satisfied under the leases. In particular, the lessee must obtain mandatory state and federal approvals before any exploration activities may proceed. Pet. App. 5a-6a. The purchase of the lease rights and the payment of the lease rentals does not guarantee the lessee that any of the state or federal approvals required before exploration can occur will in fact be granted. As this Court explained in *Secretary of the Interior* v. *California*, 464 U.S. at 339:

> Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production * * * ; the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.

3. Among the numerous requirements that must be met by a lessee before exploration and development may occur, the following are involved in this case:

a. The lessee must submit a plan of exploration for approval by the Secretary. 43 U.S.C. 1340(b), (c)(1). The Secretary may approve the exploration plan only if it is consistent with the OCSLA, with the regulations prescribed pursuant to OCSLA, and with the provisions of the lease. 43 U.S.C. 1340(c)(1). As part of the approval process, the Secretary must evaluate the environmental impacts of the activities described in the plan of exploration. 30 C.F.R. 250.203(g) (formerly codified at 30 C.F.R. 250.33(g) (1997)). In making that evaluation, the Secretary is to consider the written comments of the Governor of any affected State. 30 C.F.R. 250.203(h) (formerly codified at 30 C.F.R. 250.33(h) (1997)). If an acceptable plan of exploration is submitted to the Secretary, it is to be approved within 30 days of submittal. 43 U.S.C. 1340(c)(1). The power that the Secretary has under 43 U.S.C. 1334(a) to suspend leases while evaluating potential environmental harms (see page 4, *supra*), however, also authorizes him to suspend the 30-day approval process for exploration plans for this same purpose. H.R. Rep. No. 590, 95th Cong., 2d Sess. 49 (1978). The Secretary is directed by the OCSLA to disapprove any plan of exploration that would likely cause any condition described in 43 U.S.C. 1334(a)(2)(A)(i)—such as harm or damage to life (including fish and other aquatic life), to property, to any mineral, to the national security or defense, or to the marine, coastal, or human environment—if the plan cannot be modified to avoid that condition. 43 U.S.C. 1340(c)(1).

b. If the plan of exploration would affect the land, water use, or the natural resources of the coastal zone of any State, the plan may not be implemented unless the further requirements of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451, *et seq.*, have been satisfied. Under the CZMA,

each State may adopt a Coastal Zone Management Plan for the protection and management of its coastal areas. The Secretary is not to "grant any license or permit for any activity described in detail in the exploration plan" until the lessee has complied with the state-approval procedure established in the CZMA. 16 U.S.C. 1456(c)(3)(B); 43 U.S.C. 1340(c)(2). Under that procedure, the lessee makes an initial certification that its plan of exploration is in compliance with the State's Coastal Zone Management Plan. If the State objects to the lessee's certification, the lessee may appeal the State's objection to the Secretary of Commerce. The Secretary of Commerce may override the State's objection only upon a finding that the plan is consistent with the objectives of the Coastal Zone Management Act or is necessary in the interest of national security. 16 U.S.C. 1456(c)(3)(B)(i)-(ii); 43 U.S.C. 1340(c)(2). If the State has objected to the certification, and if the Secretary of Commerce does *not* override the State's objection, then *no* operations may be conducted under the plan of exploration. 43 U.S.C. 1340(c)(2). In that situation, the lessee must either satisfy the State's objections or submit an alternative exploration plan. 16 U.S.C. 1456(c)(3)(B). See J.A. 253-256, 329-332.

c. If the lessee's plan of exploration contemplates the discharge of any pollutants into the ocean, the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, also requires the lessee to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency. 33 U.S.C. 1311(a), 1342(a). An NPDES permit cannot be obtained unless the lessee has first complied with the state-approval requirement of the CZMA. The lessee must thus certify that the discharge would be in compliance with the Coastal Zone Management Plan of the affected State. If the State objects to that certification, the Secretary of Commerce may override the State's objection only upon a finding that the drilling plan would be consistent

with the objectives of the CZMA or is necessary in the interest of national security. 16 U.S.C. 1456(c)(3). If the Secretary of Commerce does not override the State's objection, a discharge permit may *not* be issued by the EPA. *Ibid.*

d. A lessee must obtain a permit to drill before commencing any exploratory well under an approved plan of exploration. 43 U.S.C. 1340(d); 30 C.F.R. 250.414 (formerly codified at 30 C.F.R. 250.64 (1997)). If such an exploratory well is authorized and proves successful, the lessee must then obtain approval of a development and production plan before pursuing further activity. 43 U.S.C. 1351. Drilling permits and development and production plans may be approved only if the state-approval requirements of the CZMA have been satisfied. See 43 U.S.C. 1340(c)(2), 1351(d).

e. These restrictions on operations are expressly set forth in the lease terms and in the governing statutes and regulations. Oil and gas exploration companies such as petitioners, who are "knowledgeable and sophisticated purchasers," enter into such leases fully aware of the limitations they impose on potential operations. Pet. App. 13a.

II. *Petitioners' Leases*

4. Between 1981 and 1983, petitioners bid on and obtained ten-year federal oil and gas leases offshore of the Outer Banks area of North Carolina. C.A. App. 180-183. Each of the leases was issued on a standard form. Under that lease form, the parties' rights were subject to all of the provisions and terms of the OCSLA and its regulations, to "all other applicable statutes and regulations," and to other regulations issued in the future that provide for the prevention of waste and the conservation of the natural resources of the OCS. Pet. App. 175a. The leases specify that they may be suspended or canceled by the United States under the terms set forth in the OCSLA. *Id.* at 180a.

5. During the 1980's, petitioners joined with the owners of adjacent OCS leases to form a single exploration unit known as the Manteo Unit. Pet. App. 7a. That unit contained four of the five leases involved in this case. C.A. App. 180-183, 251. Petitioner Mobil Oil Exploration and Producing Southeast, Inc. (Mobil) was the operator of the unit. C.A. App. 210.[2]

As unit operator, Mobil met in 1988 with representatives of the Minerals Management Service (MMS) of the Department of the Interior and the State of North Carolina to commence discussions regarding a potential exploratory well on the Manteo Unit. At that meeting, the Governor of North Carolina expressed the State's "grave concerns about the impacts development of any hydrocarbon resources [in that area of the Outer Banks] would have on the State's valuable estuarine system and other important coastal resources." J.A. 61. The Governor emphasized that (*id.* at 61-62):

> the earlier environmental impact statements (EIS), completed before and after the leases were issued are unsound for some topics. The level of scientific information for these ocean areas has increased dramatically since 1981. It shows unquestionably that the prior analyses were based on flawed data and assumptions. Direct and indirect onshore impacts from a discovery the size Mobil is projecting were never sufficiently analyzed.

In particular, the State expressed the concern that new information regarding fisheries, oil spill trajectories, and ocean currents and conditions was needed to ensure that petitioners' plan of exploration would comply with the

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[2] The operating agreement specified that unit operations would "be suspended while compliance is prevented * * * by governmental rules, regulations, or orders * * * provided, however, that performance shall be resumed within a reasonable time after such cause has been removed * * *." C.A. App. 236.

State's Coastal Management Plan and other applicable environmental requirements. *Ibid.*; see *id.* at 61-75.

6. Knowing that the State's objection was a potential bar to operations under these leases, Mobil entered into lengthy negotiations with the State and the MMS which resulted in a Memorandum of Understanding (MOU) dated July 12, 1989. Under the MOU, Mobil agreed to submit a draft plan of exploration for review by the State and MMS undertook to complete an Environmental Report (ER) on the exploratory well proposed by Mobil. J.A. 79. Mobil also requested and obtained a temporary "suspension" of its leases (J.A. 83) which "put the leases on hold, extended their terms, and suspended [lease] rental payment obligations." C.A. App. 128.3. The MOU further provided that "*[i]f the State objects to Mobil's certification of consistency [under the Coastal Zone Management Act], or if any other administrative or judical challenges or appeals arise*, or if the issuance of the permits for Mobil's exploration activities is delayed due to any of the other circumstances contemplated by 30 C.F.R. § 250.10," the MMS would "*issue additional suspensions of operations*, pursuant to 30 C.F.R. § 250.10, *to allow for the resolution of such matters* and to allow Mobil two drilling seasons under the [exploration plan] thereafter." J.A. 83 (emphasis added).

7. Pursuant to the MOU, Mobil submitted a draft plan of exploration for one exploratory well on the Manteo Unit on September 1, 1989. C.A. App. 268. MMS subsequently issued the draft ER required by the MOU. The State of North Carolina was unsatisfied with the draft exploration plan and the draft ER, however, because it believed that many unique facts regarding the oceanographic and coastal conditions of the Outer Banks area had not properly been taken into account. J.A. 86-95.

8. The draft plan of exploration for the Manteo Unit contemplated the discharge of wastes into the ocean. Mobil

was therefore also required to obtain an NPDES permit from EPA to pursue its plan. 33 U.S.C. 1311(a), 1342(a) (1994 & Supp. III 1997). As with respect to the permits required from the Secretary of the Interior before exploration may occur, an NPDES permit could not be issued by the EPA until Mobil obtained either the concurrence of the State of North Carolina to Mobil's CZMA compliance certification or an override by the Secretary of Commerce of any objection raised by the State. 16 U.S.C. 1456(c)(3).

When Mobil certified that its NPDES permit application complied with the North Carolina Coastal Management Plan on April 17, 1990 (J.A. 96-97), North Carolina made a timely formal objection to that certification on July 16, 1990. *Id.* at 106-112. The State's objection explained that Mobil had presented insufficient information to address and resolve the significant environmental concerns created by the proposed exploration plan. *Ibid.* The State complained that Mobil failed to provide "adequate site specific baseline data" and "has not fully documented assumptions used" in its models. *Id.* at 109. As the result, "the applicability of the models * * * cannot be judged." *Ibid.* The State concluded that "the only alternative is for Mobil to provide the required information," and that, after that information is provided, "the State will then be in a position to review the proposed activity to determine whether it may be conducted in a manner consistent with the North Carolina Coastal Management Program." *Id.* at 110.

Because of the State's objection, Mobil was not eligible to receive an NPDES permit for the proposed Manteo Unit exploration plan. 16 U.S.C. 1456(c)(3). Instead of providing the data and other information requested by the State, however, in July 1990 Mobil invoked the adversary procedures of the CZMA by seeking review of the State's objection before the Secretary of Commerce. J.A. 168. The commencement of that proceeding made petitioners' leases

eligible for suspension under the provisions of the MOU. See pages 9-10, *supra*.

III. *Enactment And Repeal Of The OBPA*

9. On August 18, 1990, the Outer Banks Protection Act (OBPA), was enacted as part of the Oil Pollution Act of 1990. Pub. L. No. 101-380, § 6003, 104 Stat. 555 (repealed 1996). The OBPA was enacted out of a concern of Congress that, in reviewing OCS activities affecting the Outer Banks region of North Carolina, the Department of the Interior needed to ensure that it was giving proper attention to the national environmental policies established under prior legislation such as NEPA and the CZMA. Congress noted that the Outer Banks of North Carolina was an area of exceptional environmental fragility, and that oil and gas development could adversely affect a fishing industry valued at more than $1 billion annually, as well as a major industry of the area, tourism. Congress noted its concern that there may be insufficient knowledge of the physical and oceanographic characteristics of the area and of the fish species that exist there. OBPA § 6003(b)(1)-(5), 104 Stat. 555. In particular, Congress expressed concern that the EIS prepared for the North Carolina lease sales before 1981 appeared insufficient and outdated and thereby failed to accomplish the objectives of federal environmental legislation. Congress found that more recent environmental inquiries had failed to allay concerns about the adequacy of information available to make decisions about leasing, exploration, and development offshore of North Carolina. OBPA § 6003(b)(6)-(8), 104 Stat. 555-556.

In light of these concerns about the sufficiency of environmental information for the uniquely fragile Outer Banks, the OBPA (i) required the establishment of an Environmental Sciences Review Panel (ESRP) to review the environmental issues affecting this area and (ii) directed the

Secretary not to make further lease sales or approve further exploration or development and production activities offshore of North Carolina until the later of October 1, 1991, or 45 days of continuous session of Congress after the Secretary submitted a written report to Congress, made after consideration of the findings and recommendations of the ESRP, certifying that available information *is* sufficient to enable the Secretary to carry out his responsibilities under the OCSLA in authorizing the activities listed above. OBPA § 6003(c)(3), 104 Stat. 556. The ESRP established by the OBPA was required to prepare and submit to the Secretary findings and recommendations:

> (i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the [OCSLA] with respect to authorizing [leasing, exploration, and development]; and
>
> (ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities * * * .

OBPA § 6003(e)(2)(A), 104 Stat. 557. The ESRP was to terminate its activities after submitting its findings and recommendations to the Secretary. OBPA § 6003(e)(4), 104 Stat. 558.

10. Following enactment of the OBPA on August 18, 1990, the MMS issued suspensions that applied generally to all leases offshore of North Carolina. J.A. 129-138. Under those suspensions, the terms of the affected leases were "extended for a period of time equal to the period the suspension is in effect" and "[n]o payment of rental is required during the period of this directed suspension." J.A. 130. At the time this general suspension was issued, the leases of petitioners

were already eligible for suspension under the specific terms of the MOU because of the State's earlier objection to the CZMA consistency certification for the NPDES permit. See pages 9-10, *supra*.

11. Following enactment of the OBPA, petitioners continued to treat their North Carolina leases as in effect and as binding upon the parties. They continued to exercise various rights under the leases and continued to seek and demand performance from the United States. In particular, on August 20, 1990, Mobil submitted for approval its final plan of exploration to drill one exploratory well on the Manteo Unit. J.A. 115. Accompanying that plan was a certification by Mobil that the plan of exploration satisfied the North Carolina Coastal Zone Management plan. The State of North Carolina promptly objected to that certification on November 19, 1990. *Id.* at 141-148. That objection conclusively barred the Secretary of the Interior from permitting any implementation of the proposed plan of exploration unless the State's objection was overturned by the Secretary of Commerce. 43 U.S.C. 1340(c)(1). In November 1990, petitioners therefore sought review of the State's CZMA objections before the Secretary of Commerce. J.A. 168.

That proceeding was conducted by the Secretary of Commerce jointly with his review of the State's prior CZMA objections to the NPDES permit application for that same unit. J.A. 168-169, 186-187, 196-336. North Carolina, along with 13 federal agencies and the National Security Council, took part in those administrative proceedings. *Id.* at 211, 277. The OBPA had no effect, and imposed no delay, on this review of the State's CZMA objections by the Secretary of Commerce. *Id.* at 186-187.

12. In January 1992, while petitioners' appeals to the Secretary of Commerce were still pending, the ESRP issued its final report to the Secretary of the Interior. That report

recommended that additional environmental data and studies be obtained before proceeding further with development of the Outer Banks. J.A. 149-164. The Secretary then issued a report to Congress, as required by the OBPA, in April 1992. Pet. App. 198a-204a. In that report, the Secretary addressed the ESRP's recommendations and concluded that he possessed sufficient information to perform his obligations under the OCSLA for review of the pending Manteo Unit plan of exploration. *Id.* at 202a. That certification by the Secretary removed the temporary restraint on approval of the Manteo Unit plan of exploration under the OBPA. The Secretary nonetheless voluntarily deferred further consideration of that plan until he completed two discrete environmental studies recommended by the ESRP. *Ibid.* Throughout this entire period, all activities on the proposed Manteo Unit were in any event barred by the objections of North Carolina to Mobil's CZMA certifications of its plan of exploration and NPDES application. 16 U.S.C. 1456(c)(3)(A)-(B); J.A. 106-112, 141-148.

13. After the Secretary submitted his April 1992 certification to Congress, the MMS sent a letter to the lessees of OCS leases on the Outer Banks that terminated the suspensions imposed on those leases in September 1990. J.A. 165-167. But petitioners then requested the MMS to *reinstate* the lease suspensions, pursuant to the MOU, so that petitioners could continue to pursue their administrative appeals of North Carolina's CZMA objections. J.A. 168-172. Petitioners stated that, while the mandates of the OBPA had "been fulfilled, the Manteo Unit partners are still awaiting a decision from the U.S. Department of Commerce on appeals from the State of North Carolina's Denials of Consistency Certification on the [Manteo Unit] Exploration Plan and the NPDES Permit. These appeals were filed respectively, in July 1990 and December 1990." J.A. 168. Because those proceedings have delayed any operations on

the Manteo Unit "over the past period of years," and because that delay "continues at present," petitioners asked for the lease suspensions to be continued in effect. *Id.* at 169. MMS granted petitioners' request for a further suspension of the leases. *Id.* at 172-174.

14. In July 1994, MMS released the two environmental studies that the Secretary voluntarily performed in connection with his review of the Manteo Unit plan of exploration. J.A. 194. At that time, however, the lease suspensions granted to Mobil pending a decision by the Secretary of Commerce on the State's objections to the plan of exploration and the discharge permit still remained in effect. Pending resolution of those proceedings, and pursuant to the lease suspensions issued at Mobil's request, no further action was taken by the Secretary on the proposed plan of exploration.

15. On September 2, 1994, the Secretary of Commerce issued decisions declining to override the objections of the State of North Carolina to the plan of exploration and the discharge permit that Mobil requested for the Manteo Unit. J.A. 196-336. The Secretary noted that the area in which petitioners sought to drill for oil and gas—"The Point" of the Outer Banks—is "unique" in its "physical and biological qualities." *Id.* at 207. Because of its location at the "convergence of the Gulf Stream, continental slope and shelf waters," there are concentrated masses of "nutrients, plankton and floating materials near the sea surface" that make "The Point [a] highly productive and ecologically unique area essential to the State's coastal zone." *Ibid.* The "anomalously high biomass" of this area makes it an "unusually abundant" environmental resource. *Ibid.* As a result, "the area serves as an important migratory pathway, feeding habitat and spawning ground for several commercially significant species." *Id.* at 225.

With respect to both the proposed discharge permit and the proposed plan of exploration, the Secretary concluded that there was inadequate information "to adequately assess the risk of adverse impacts" on these important environmental resources. J.A. 228, 304.[3] The Secretary found that the environmental hazards from these activities are particularly significant because of the location of the proposed drilling site at "one of the most productive offshore fishing grounds along the east coast." *Id.* at 243. The Secretary noted that available data suggested that the proposed exploration would "have adverse effects on the resources and uses of the State's coastal zone." *Id.* at 245. "Given that this is a frontier area and an area of rich natural resources upon which the State heavily depends," the Secretary concluded that "Mobil has not adequately documented the biological resources or ecological relationships at risk." *Ibid.* The Secretary further concluded that "the ecological relationship of the benthic environment to the State's fisheries must be further assessed in order to adequately evaluate the risks of impact of Mobil's proposed activities." *Id.* at 246.

16. After the Secretary of Commerce declined to override North Carolina's objections under the CZMA, the MMS informed Mobil that the lease suspensions that had been granted pending that decision were terminated. C.A. App. 534. Petitioners, however, promptly filed a suit in federal district court to challenge the determinations made by the Secretary of Commerce. *Mobil Oil Exploration* v. *Brown*, Civ. No. 95-93SSH (D.D.C.). They then requested "reinstatement of the suspensions" in order to complete their suit challenging the decisions upholding the State's

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[3] One of the specific concerns that supported the State's objections was that "Mobil's proposed wastes may either destroy or poison a food source for part of the State's demersal fishery resources." J.A. 231.

CZMA objections to the plan of exploration and the discharge permit. App., *infra*, 2a.

The MMS granted the suspension request, noting that the requested suspensions "are appropriate pursuant to 30 C.F.R. 250.10(b)(6) and the MOU while Mobil seeks judicial review of the Secretary's decision." App., *infra*, 5a. This lease suspension, which was issued at petitioners' request, remains in effect to this day.

17. In 1996, Congress repealed the OBPA. Pub. L. No. 104-134, Title I, Department of the Interior § 109, 110 Stat. 1321-177. Because the Secretary of Commerce declined to override North Carolina's objections to the plan of exploration and the discharge permit, petitioners were barred *both before the OBPA was enacted and after the OBPA was repealed*—as well as while the OBPA was in effect—from any action to implement the proposed Manteo Unit plan of exploration. 43 U.S.C. 1340(c)(2).

IV. *The Present Litigation*

18. In October 1992, more than two years after the OBPA was enacted and during the period that lease suspensions requested by Mobil were in effect, petitioners joined an action filed in the United States Court of Federal Claims in which they claimed that enactment of the OBPA in 1990 effected a material breach and an anticipatory repudiation of their leases.[4] The trial court awarded summary judgment to petitioners (Pet. App. 45a-99a) and entered a final judgment awarding them "restitution of their up-front [lease] payments" in a total amount exceeding $156 million. *Id.* at xa, 44a.

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[4] The action was commenced by Conoco, Inc., in May 1992. J.A. 1. Petitioners are the sole remaining plaintiffs in that action. The complaint included an allegation of a taking of property, which is not before the Court at this time.

19. The court of appeals reversed. Pet. App. 3a-24a. The court concluded that "there is no evidence of a breach of contract by the United States" and that "the lease agreement in this case has not been breached by either party." *Id.* at 18a-19a. "Rather, [petitioners have] been unable to obtain the necessary Government approvals that would allow [them] to go forward with exploration of the lease site, a problem for [petitioners] that arose in 1989, before the OBPA was enacted, and continued after the OBPA was repealed." *Ibid.* The court rejected petitioners' argument that the OBPA was "a supervening act" that made performance impossible. *Id.* at 19a. The court noted that the "OBPA was not the cause of [petitioners'] inability to obtain issuance of the required permits and approvals for its proposed oil exploration." *Ibid.* Although the lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources" (*id.* at 13a), that right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open." *Ibid.*

The court of appeals further explained that "[w]hatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the [plan of exploration's] CZMA consistency certification or the override provided by law." Pet. App. 14a. The court observed that "North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA * * *; North Carolina maintained [its] * * * objections throughout the time that the moratorium imposed

by the OBPA was effective." *Ibid.* The court concluded that "[u]nder the circumstances of this case, to treat [petitioners'] failure to obtain the necessary approvals and permits for exploratory activity as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters." *Id.* at 15a.

The court of appeals also found unconvincing petitioners' contention that, "even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation." Pet. App. 16a. The court explained that "[t]he lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease." *Id.* at 18a.[5]

Judge Newman dissented. Pet. App. 19a-24a. In Judge Newman's view, petitioners had an "entitlement" under their leases to explore the tracts in question that "was negated when the government refused to issue the requisite permits, barring all exploration." *Id.* at 20a. Judge Newman reasoned that the United States breached the leases by refusing "to override North Carolina's objection, although it had that right by statute." *Ibid.*[6]

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[5] Because the court of appeals reversed the trial court's finding of liability, the court did not address the challenges raised by the government to the manner in which the lower court calculated the amount of restitution.

[6] In response to a petition for rehearing, Judge Newman revised her original dissent, in which she had concluded that "the United States did not breach this contract." Pet. App. 43a. In her original dissent, she had reasoned that restitution was nonetheless permissible on the theory that "the contract was voided without the fault of either party" because it had been "made impossible of performance * * * due to the continuing intervention of the State of North Carolina." *Ibid.*

V. *The Pending CZMA Litigation*

20. The suit filed by petitioners to challenge the decision of the Secretary of Commerce declining to override the State's CZMA objections to the Manteo Unit is still pending in federal district court. The court stayed those proceedings after petitioner sought to supplement the administrative record in 1996 to add with studies "submitted more than two years after the comment period closed." 920 F. Supp. 1, 2 (D.D.C. 1996). The court concluded that the Secretary of Commerce should decide whether to reopen the record and that, "[i]f the Secretary decides against reopening the [record], the Court will lift the stay." *Id.* at 3.

The Secretary of Commerce advised the parties on December 8, 1999, that he declined to reopen the record to admit the two new studies. In doing so, the Secretary emphasized that, "even were I to reopen the record to admit the two studies and reconsider my decision, I would still lack sufficient information to override North Carolina's objections." App., *infra*, 8a.[7]

The federal district court proceedings commenced by Mobil are thus still pending, and the lease suspensions requested by Mobil therefore remain fully in effect. See page 17, *supra*.

SUMMARY OF ARGUMENT

I. Petitioners seek rescission and restitution for a purported breach and repudiation of their leases which they assert occurred through the enactment and implementation of the OBPA. There is no dispute among the parties that

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[7] The Secretary of Commerce stated that he "continue[d] to encourage Mobil, North Carolina and other interested parties to work toward resolution of North Carolina's need for additional scientific information about the impacts of Mobil's proposed projects on its coast resources." App., *infra*, 8a-9a.

this case is governed by the general principles of contract law incorporated as federal common law under the decisions of this Court.

The standards for rescission and restitution under the federal common law of contracts are most stringent. A contract claimant may obtain rescission and restitution only by establishing that there has been a material or total breach that defeats the essential object or purpose of the contract. Similarly, only a repudiation of an essential element of the contract can justify rescission and restitution. A failure to perform that is not a material breach of the contract, or that does not defeat an essential object of the agreement, may merit an award of provable damages, but it does not justify rescission and restitution.

Even when a material breach or repudiation of the central object of the contract occurs, rescission and restitution do not automatically follow. The party who seeks such relief must unequivocally manifest his intention to rescind the contract within a reasonable time. If the non-breaching party continues to treat the contract as binding after the purported breach or repudiation, and continues to seek performance from the allegedly breaching party, he may not subsequently claim that the breach was material and may not then obtain restitution. In that situation, the claimant is limited to a recovery of such damages as are proven to result from the partial breach.

II. The standards governing rescission and restitution are not satisfied by petitioners in the circumstances of this case. The OBPA did not effect a material breach or repudiation of the cental object of the lease agreements. Indeed, as the court of appeals correctly held, that Act did not result in *any* breach of contract by the United States (Pet. App. 19a).

The OBPA did not impose any new substantive requirements or conditions upon petitioners. That Act suspended

the Secretary's approval of lease operations offshore of North Carolina for the specific purpose of ensuring that the Secretary was adequately implementing other, preexisting environmental legislation to which such leases are expressly subject. These leases, and the statutes and regulations to which the leases are subject, authorize lease suspensions and administrative delays so that environmental studies may be conducted. Delays of that nature are expressly contemplated and provided for by the parties' agreements and thus do not represent a material breach or repudiation of the leases.

Far from defeating the central object of the leases, the OBPA in fact imposed *no* delay on the parties' performance beyond that already occurring under the express terms of the leases. Petitioners' ability to undertake exploration activities under their leases was at all times—before enactment of the OBPA, while it was in effect, and after its repeal—barred by North Carolina's objections under the CZMA. If the OBPA had never been enacted, petitioners would have thus experienced precisely the same delay in proceeding with their proposed operations.

III. Presumably recognizing that fact, petitioners did not treat their leases as materially breached or repudiated when the OBPA was enacted in 1990. Instead, they did just the opposite. They treated the leases as continuing in effect and repeatedly demanded contract performance by the United States by (i) submitting a proposed plan of exploration, (ii) contesting the objections of the State of North Carolina to the plan of exploration and the associated discharge permit in proceedings conducted before the Secretary of Commerce under the CZMA and (iii) requesting and obtaining suspensions of their lease obligations so that they could conduct those continuing proceedings. Through these actions, petitioners made an affirmative election to continue the contract in effect and thereby waived any claim of rescission based

upon the alleged breach or repudiation of the leases occurring through enactment of the OBPA.

IV. Petitioners have separately requested and received all of the relief to which they may be entitled. Even if a technical breach of the lease agreements occurred, which we dispute, petitioners would be limited to such damages as could be proved from any delay imposed by the OBPA. No such delay occurred, and no such damages exist. Instead, at petitioners' repeated requests, and for reasons unrelated to the OBPA, petitioners' leases were extended for a period of time that began *before* the OBPA was enacted and that continues to this date, long *after* the OBPA has been repealed. Throughout this period, petitioners' leases have been continuously extended, and petitioners have been relieved of any obligation to make lease rental payments. At petitioners' request, these lease suspensions still remain in effect and will not expire until petitioners' challenge to the State of North Carolina's objections to the Manteo Unit exploration plan are finally resolved in other litigation now pending in federal district court. The court of appeals correctly concluded that petitioners' continuing failure to satisfy North Carolina's CZMA objections is "not attributable to" the United States and "does not create an entitlement to any refund of the consideration paid to obtain the lease." Pet. App. 18a.

ARGUMENT

I. GENERAL STANDARDS GOVERNING RESTITUTION APPLY TO THIS CASE

Although the background of this case involves a complex statutory and regulatory scheme governing the offshore leasing of federal lands, resolution of the parties' dispute turns on the application of basic principles of contract law. Petitioners seek rescission and restitution for a purported breach and repudiation of leases that allegedly resulted from

the enactment and implementation of the OBPA. The contractual issues to be resolved in this case are questions of federal common law that are "not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U.S. 174, 183 (1944).

A. Standards For Recovery Of Restitution For Material Breach

It is well established that "[n]ot every departure from the literal terms of a contract is sufficient to be deemed a material breach" that would justify rescission and restitution. *Stone Forest Indus., Inc.* v. *United States*, 973 F.2d 1548, 1550-1551 (Fed. Cir. 1992). Under the federal common law of contracts, a contract claimant may obtain rescission and restitution for breach of contract only by demonstrating a material or total breach that goes to the essence of the contract and defeats its essential object and purpose. *Everett Plywood Corp.* v. *United States*, 512 F.2d 1082, 1093-1094 (Ct. Cl. 1975) (restitution improper when the breach "neither defeated the whole purpose of the contract nor deprived plaintiff of substantially all that it had bargained for"); *Rudd Paint & Varnish Co.* v. *White*, 403 F.2d 289, 291 (10th Cir. 1968) (rescission and restitution appropriate only when a breach is "substantial"); *Neenan* v. *Otis Elevator Co.*, 180 F. 997, 1000-1001 (S.D.N.Y. 1910) (rescission and restitution appropriate only when the breach or default "goes to the substance of the contract"), aff'd, 194 F. 414 (2d Cir. 1912). "Restitution is an available remedy for breach of contract only when the breach is of such vital importance and so material that it is held to go to the 'essence' of the contract." *United States* v. *Western. Cas. & Sur. Co.*, 498 F.2d 335, 339-340 (9th Cir. 1974) (citing 5 *Corbin on Contracts* § 1104, at 562 (1964)). See also John D. Calamari & Joseph M. Perillo, *Contracts* § 15-3, at 649 (3d ed. 1987); 1 George E. Palmer, *The Law of Restitution* § 4.7, at 427 (1978).

Whether, for this purpose, a contract has been materially breached turns on "the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties." *Stone Forest Indus., Inc.* v. *United States*, 973 F.2d at 1551.[8] Among the factors considered in determining whether a breach is material is an assessment of the "object of the parties in making the agreement" (*Federal Land Bank of Wichita* v. *Krug*, 856 P.2d 111, 115 (Kan. 1993)), "the purpose of the contract" (*Gibbs* v. *G.K.H., Inc.*, 427 S.E.2d 701, 702 (S.C. Ct. App. 1993)), and whether the claimant has been denied the "major benefit" of the exchange (*Thomas* v. *HUD*, 124 F.3d 1439, 1442 (Fed. Cir. 1997)). A material breach is one that defeats both the purpose and object of the contract and that renders performance "substantially different from what was contracted for." *Callanan* v. *Powers*, 92 N.E. 747, 752 (N.Y. 1910). "A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a rescission of the contract." *Eliker* v. *Chief Indus.*, 498 N.W.2d 564, 566-567 (Neb. 1993) (quoting *Klapka* v. *Shrauger*, 281 N.W. 612, 616 (Neb. 1938)).

[8] As Professor Corbin has noted, whether a breach is described as a total or partial breach turns on "a careful weighing of the importance of the facts and events before it, a reasonable interpretation of the expressions of the parties, a consideration of existing doctrines and antecedent cases, and a determination of what public welfare and sound policy require." 4 *Corbin on Contracts*, *supra*, § 946, at 812. "In one sense, there is never such a thing as an immaterial breach. For any breach of contract, an action lies; any breach is material enough for that, although if no substantial injury is shown the damages recoverable are only nominal. But not infrequently the term material breach is used to mean one that the injured party can elect to treat as a total breach." *Id.* at 813. A judgment about whether a breach is "material" for this purpose is thus implicitly a judgment about whether restitution is an appropriate remedy. *Id.* at 812 (the label "stat[es] the result").

The applicable test is whether the breach is so substantial that it "go[es] to the root of the agreement" and defeats the parties' object in making the contract. *Frank Felix Assocs., Ltd.* v. *Austin Drugs, Inc*, 111 F.3d 284, 289 (2d Cir. 1997) (citations omitted).

Even when a material breach occurs, the non-breaching party is not automatically entitled to rescission and restitution, for he must take "affirmative steps" to "manifest his intention to rescind within a reasonable time." *Graham* v. *James*, 144 F.3d 229, 237-238 (2d Cir. 1998). If the non-breaching party continues to treat the contract as binding and continues to demand performance from the other party after a breach occurs, he may not subsequently claim the breach was material and obtain restitution. Instead, the claimant is then limited to such provable damages as occurred from the partial breach. See, *e.g.*, *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d 1306, 1313 (Ct. Cl. 1976); *Everett Plywood Corp.* v. *United States*, 512 F.2d at 1093.

B. Standards For Recovery Of Restitution For Repudiation

Similar rules apply when the claim of restitution is based on an alleged repudiation of the contract. A refusal to perform an incidental obligation does not warrant rescission of the contract. To justify rescission and restitution, the repudiation must be so material that it defeats the essential object of the parties in making the contract. *City of Fairfax* v. *Washington Metro. Area Transit Auth.*, 582 F.2d 1321, 1327-1331 (4th Cir. 1978), cert. denied, 440 U.S. 914 (1979); *Fredonia Broad. Corp.* v. *RCA Corp.*, 481 F.2d 781, 794 (5th Cir. 1973). The repudiation must be a "'refusal to perform * * * of the whole contract or of a covenant going to the whole consideration.'" *City of Fairfax* v. *Washington Metro. Area Transit Auth.*, 582 F.2d at 1327 (quoting *Kimel*

v. *Missouri State Life Ins. Co.*, 71 F.2d 921, 923 (10th Cir. 1923)). Accord, *Campos* v. *Olson*, 241 F.2d 661, 662-663 (9th Cir. 1957). "[T]he obligation repudiated must be so essential to the purpose of the contract that non-performance makes the agreement worthless." *United Corp.* v. *Reed, Wible and Brown, Inc.*, 626 F. Supp. 1255, 1257 (D. V.I. 1986). To warrant restitution, a repudiation "cannot consist of a mere partial breach; nor can it be based on mere delay unless the contract makes time of the very essence." *City of Fairfax* v. *Washington Metro. Area Trans. Auth.*, 582 F.2d at 1327 (footnotes omitted).

The repudiation must also reflect a "distinct and unequivocal absolute refusal to perform, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end." *Smoot's Case*, 82 U.S. (15 Wall.) 36, 48 (1872). See also *Dingley* v. *Oler*, 117 U.S. 490, 503 (1886); *Tretchick* v. *Department of Transp.*, 109 F.3d 749, 752 (Fed. Cir. 1997) (anticipatory repudiation must be an absolute, unqualified communication of refusal to perform); *United States* v. *Dekonty Corp.*, 922 F.2d 826, 827-828 (Fed. Cir. 1991); *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988).

As with claims for rescission based upon an alleged material breach, a claim for rescission based upon a repudiation of the contract may not be pursued if the claimant did not treat the contract as at an end but instead continued to seek compliance with it. "On the heels of [a] repudiation [the non-repudiating party] had two options: (1) it could have stopped performance and sued for total breach; or (2) it could have affirmed the contract by continuing to perform while suing in partial breach." *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d 643, 649 (2d Cir. 1991). Actions taken by the non-breaching party to seek or demand

performance by the other party after the purported repudiation are "tantamount to an election to affirm the contract." *Ibid.*, citing, *e.g.*, *Cities Service Helex, Inc.* v. *United States*, 543 F.2d at 1313-1314.

For petitioners to prevail in this case, they therefore must establish that a delay occurring from the operation of the OBPA (i) effected a material breach of the leases that defeated their essential object or (ii) constituted an unequivocal and absolute refusal to perform and a repudiation of the central or "root purpose" of the lease agreements. Even if such a material breach or repudiation were established, petitioners would then also be required to establish that they in fact treated the leases as at an end and did not continue to seek or demand performance under the leases by the United States.

II. THE OBPA DID NOT MATERIALLY BREACH OR REPUDIATE PETITIONERS' LEASES

The court of appeals correctly concluded that petitioners cannot satisfy these prerequisites of restitution. As the court explained, the enactment and implementation of the OBPA did not effect a breach of the leases at all, much less a material breach. Pet. App. 18a-19a.[9] The OBPA did not impose any new *substantive* requirements or conditions upon petitioners or the Secretary. That statute required the Secretary of the Interior to ensure that he was conducting a realistic review of the environmental issues that were framed under the preexisting legislative scheme (NEPA, CZMA, and OCSLA) to which these leases were expressly

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[9] *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), on which petitioners seek to rely, is fundamentally inapposite because, as the court of appeals correctly held, "there is no evidence of a breach of contract by the United States" in this case. Pet. App. 19a. The Court's decision in *Winstar*, moreover, does not address, and is not inconsistent with, any of the established legal prerequisites of restitution discussed in this brief.

subject. A temporary suspension of lease operations to permit such environmental investigations to be conducted is specifically authorized by the terms of the leases and by the regulations to which the leases are subject. Because a delay of that nature is expressly authorized under the leases, it did not constitute a material breach or repudiation of the leases.

A. *The Enactment And Implementation Of The OBPA Did Not Breach Petitioners' Leases*

1. Prior to enactment of the OBPA, petitioners had tentatively proposed to drill an exploratory well in an area of the Outer Banks that is "[o]ne of the East Coast's most important commercial and recreation fisheries" and is "characterized by unique physical and biological qualities." J.A. 207. The proposal to drill in this "ecologically unique area" (*ibid.*) created especially sensitive environmental concerns for the Outer Banks and for the State of North Carolina—concerns that had not been alleviated by earlier environmental reports prepared by MMS. *Id.* at 61-75.[10]

In enacting the OBPA, Congress found that the oceanographic characteristics of the Outer Banks were complex and not well documented, that little was understood about the unique ecology of that area, and that prior studies had not addressed and resolved the significant environmental questions posed by development in this sensitive offshore zone. OBPA § 6003(b), 104 Stat. 555-556. The Act therefore

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[10] In 1994, the Secretary of Commerce declined to override North Carolina's objection to the drilling proposal under the CZMA and concluded that petitioners had failed adequately to address the environmental harms threatened by their proposed development of the Outer Banks leases. J.A. 245-246; see pages 16-17, *supra*. Instead of providing the data and related information that had been requested by the State, Mobil pursued a course of litigation—challenging the determinations of the State and the Secretary of Commerce in a district court proceeding that is still pending. See pages 20-21, *supra*.

directed the Secretary not to approve further leases or lease operations in the Outer Banks until he was able to certify that he possessed sufficient information to discharge his preexisting environmental responsibilities under the OCSLA. A panel of knowledgeable experts—the ESRP—was created to provide information and recommendations to assist the Secretary in making that certification. See page 12, *supra*. The Secretary was not required to accept any recommendations made by that panel. Instead, after the Secretary certified in 1992 that he possessed sufficient environmental information to discharge his responsibilities under the OCSLA, his authority to approve or disapprove proposed operations under the OCSLA was unaffected by the OBPA. OBPA § 6003(c)-(e), 104 Stat. at 556-558. See pages 14-15, *supra*.

Any temporary delay in the approval of lease operations that could have resulted before the Secretary certified his readiness to perform his OCSLA responsibilities was precisely the type of delay contemplated and authorized by the parties under these leases. By incorporating the provisions of the OCSLA and other applicable statutes and regulations, the leases authorize the suspension of "any operation or activity" when appropriate "*in the national interest*" or "if there is a *threat of serious, irreparable, or immediate harm or damage to* life (including *fish and other aquatic life*), to property, to any mineral deposits (in areas leased or unleased), *or to the marine, coastal, or human environment* * * * ." 43 U.S.C. 1334(a)(1)(A)-(B) (emphasis added). Lease suspensions of this type "merely put the leases on hold, extend[] their terms, and suspend[] rental payment obligations." C.A. App. 128.3.

This contractual authority to suspend lease operations when environmental harm is threatened or when dictated by

the "national interest" applies directly here.[11] The Conference Report on the OBPA notes that any delay resulting from the performance of the required environmental analysis is "related to a legitimate and broad-based public purpose—environmental protection" and to the need "for the collection and analysis of crucial oceanographic, ecological, and socioeconomic data." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 163 (1990). The Conferees concluded that such environmental investigation is "a reasonable action to prevent a public harm that could result from the lack of such information." *Ibid.*

By incorporating the regulations issued under the OCSLA, the leases also authorize suspension when "necessary for the implementation of the requirements of the National Environmental Policy Act or *to conduct an environmental analysis.*" 30 C.F.R. 250.110(b)(4) (emphasis added) (formerly codified at 30 C.F.R. 250.10(b)(4) (1997)). That suspension provision applies precisely to the OBPA, which by its terms directed the Secretary to "conduct an environmental analysis" to ensure that he was properly able to perform his duties under the OCSLA. OBPA § 6003(c)-(e), 104 Stat. at 556-557.

The fact that it was *Congress* that directed the Secretary to perform this environmental analysis—and that the Secretary did not initially undertake this review on his own initiative—does not make the suspension provision inapplicable. This Court has emphasized that it is not a breach of contract for Congress to mandate specific action that was otherwise left to the discretion of the Secretary under a federal lease. *North American Commercial Co.* v.

[11] The 30-day review procedure established for plans of exploration under 43 U.S.C. 1340(c)(1) is similarly subject to deferral whenever the Secretary "believes a suspension of activities on the lease is warranted." H.R. Rep. No. 590, *supra*, at 49.

United States, 171 U.S. 110, 134 (1898). The United States is "the real contracting party," and the Secretary is merely its agent. *Ibid.* Under the applicable statutes and regulations, the United States was entitled to require a suspension of the leases to "conduct an environmental analysis" and thereby determine whether the preexisting environmental requirements applicable to those leases were being met.[12] That is precisely what Congress directed in enacting the OBPA: as the Conferees emphasized, because the leases incorporate the suspension regulations, "the lease terms of all affected OCS tracts will be extended" rent-free during the period that the required environmental determinations are being made and "the interests of the lessees [therefore] will not be adversely affected to achieve the legitimate purposes of this section." H.R. Conf. Rep. No. 653, *supra*, at 163.[13]

[12] In addition, 30 C.F.R. 250.110(b)(6) permits suspension of OCS leases, at the direction of the United States or at the request of the lessee, to allow for inordinate delays encountered by lessees in obtaining required permits or consents. This regulation permits suspension "because of governmental delays beyond the control of the lessee." 47 Fed. Reg. 30,055 (1982).

[13] Petitioners incorrectly imply (Mobil Br. 5-7; Marathon Br. 10-11) that the legislative history of the OBPA demonstrates an intent by Congress to accomplish an open-ended ban on exploration. Petitioners' description of the contents of the "legislative record" is inaccurate. In particular, the cited letters from Congressman Walter Jones and Governor James Martin of North Carolina to President Bush concerning lease operations on the Outer Banks (J.A. 102-105) are not part of the Congressional Record and do not address or explain the scope or purpose of the OBPA. None of the remarks cited by petitioners that actually *are* part of the legislative history of the Act conflict with the clear statement of the Conference Report that the Act merely imposed a "temporary delay in the approval of activities on existing leases offshore North Carolina" for which the leases would be "extended" and which would therefore not "adversely affect" the interests of the lessees. H.R. Conf. Rep. No. 653, *supra*, at 163. As Mobil concedes (Mobil Br. 6), when Congressman Jones

2. The requirement that the Secretary certify to Congress that he possessed sufficient information to comply with his responsibilities under OCSLA before approving further lease operations under that statute (OBPA § 6003(c)(3), 104 Stat. 556) did not alter petitioners' rights under the leases. All operations conducted under OCS leases are subject to compliance with the requirements of OCSLA, NEPA and the CZMA. See pages 5-7, *supra*. If the Secretary did not possess sufficient information to comply with his responsibilities under those statutes, he would not be able to authorize any lease operations. The OBPA did not add any new substantive requirements to those preexisting statutory conditions upon lease operations. See pages 12-13, supra. After completing the required environmental inquiries, the Secretary was authorized to approve exploration and development of OCS leases on the Outer Banks under the same legal criteria that applied prior to enactment of the OBPA. See pages 14-15, *supra*.

In 1992, the Secretary certified to Congress that he possessed sufficient information to carry out his responsibilities under the OCSLA for review of the Manteo Unit exploration plan. Pet. App. 198a.[14] At that time, however, the Secretary

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had previously sought an actual ban on exploration offshore of North Carolina, the House of Representatives rejected the request.

[14] Petitioners incorrectly assign importance to the fact that the Secretary's certification did not expressly address any subsequent or alternative exploration or development activities petitioners might want to perform. See Mobil Br. 8-9, 21, 24 n.21; Marathon Br. 15, 29. It is not surprising that the Secretary's certification specifically addressed only the Manteo Unit plan of exploration, for the Secretary had no other proposals for exploration or development before him. He obviously could not certify that he possessed sufficient information to carry out his responsibilities under the OCSLA regarding *other* activities that petitioners might hypothetically wish to perform at some future time. If other activities were proposed in the future, they could not, under the terms of the leases, be approved unless the Secretary had sufficient information to make the

decided, on his own initiative, to defer approval of the proposed Manteo Unit plan of exploration until two specific environmental studies recommended by the ESRP were completed.[15] Pet. App. 202a. The Secretary's determination to conduct those *additional* "environmental analyses" was authorized by the leases (see page 32, *supra*); it was not a requirement imposed by the OBPA. See note 15, *supra*.[16] The lessees acknowledged that their leases authorized a suspension for the performance of such environmental studies by requesting a renewal of their lease suspensions at that time. J.A. 168-174.

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environmental determinations required under the preexisting applicable statutes. See pages 5-7, *supra*. The OBPA did not alter that fact.

[15] Under the OBPA, the Secretary was not required to adopt any of the environmental study recommendations of the ESRP. See H.R. Conf. Rep. No. 653, *supra*, at 162.

[16] Mobil errs in asserting that the Secretary refused to permit exploration of the Manteo Unit until completion of "all of the studies recommended by the Panel." Mobil Br. 8. In fact, the Secretary stated that he would pursue only two of the studies recommended by the ESRP. Contrary to petitioners' contention (Mobil Br. 8-9; Marathon Br. 15-16), the Secretary did not suggest that any future exploration proposals would be delayed for the performance of additional studies recommended by the ESRP. The Secretary instead stated that environmental information would "be evaluated after the results are available from the first exploratory well" and that the need for additional studies would be addressed as "a part of th[e] environmental assessment process" required under the OCSLA before development operations could commence. Pet. App. 202a. See 43 U.S.C. 1351(e)-(f).

Mobil incorrectly suggests that the ESRP "determined that additional studies would be required before deciding whether to permit *any* of these additional wells." Mobil Br. 9. The ESRP was plainly not empowered to rule upon anything; it merely performed an analysis and issued a report making recommendations. OBPA § 6003(3), 104 Stat. 557. The Secretary was vested with the responsibility and authority under the OCSLA to decide whether to approve any proposed activities, and the OBPA did not change that. 43 U.S.C. 1340(c).

B. *The OBPA Did Not Deprive Petitioners Of The Central Object Of The Leases Or Constitute A Refusal To Perform Them As A Whole*

The OBPA did not defeat the central object of the leases. In fact, that Act imposed no delay on the performance of the parties beyond that already authorized and occurring under the express terms of the leases. Petitioners' ability to undertake exploration activities under these leases was at all times—both before enactment of the OBPA and after its repeal—blocked by North Carolina's objections under the CZMA. See pages 14-15, *supra*. Even if the OBPA had never been enacted, petitioners would thus have experienced precisely the same delay in proceeding with the proposed operations. As the court of appeals stated, petitioners' "failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective" (Pet. App. 15a).

1. The sole aspect of performance that petitioners claim was impeded during the temporary delay assertedly imposed by the OBPA was the right to have an "approvable" plan of exploration accepted by the Secretary within 30 days of its submission. 43 U.S.C. 1340(c)(1). But petitioners offer no plausible basis for asserting that the 30-day period assigned for this particular administrative step goes to the "essence" of the parties' agreement. It is, in fact, abundantly clear that it does not.

The "essence" of the parties' agreement was for petitioners to obtain a first priority on any right to seek access to offshore minerals for exploration and development. That right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies." Pet. App. 13a. Approval of an exploration plan is only one among many express preconditions to the exploration and

development of an OCS lease. Even when the Secretary has approved an exploration plan, no activities may occur pursuant to the plan when (as in this case) the lessee has not achieved compliance with the Coastal Zone Managment Plan of the affected State. 16 U.S.C. 1456(c)(3)(B); 43 U.S.C. 1340(c)(2). And when, as in this case, the plan of exploration contemplates the discharge of wastes into the ocean, no exploration activities may occur until the lessee obtains an NPDES permit from EPA—a requirement that is independently subject to the CZMA certification process that petitioners have failed to satisfy. 16 U.S.C. 1456(c)(3)(A)-(B); 33 U.S.C. 1311(a), 1342(a). Moreover, even if CZMA compliance were at some point obtained, exploration still could not occur until the lessee obtains a drilling permit—which is an approval procedure for which no specific time limit applies. See 43 U.S.C. 1340(d); 30 C.F.R. 250.414.

The legislative history of the OCSLA confirms that the 30-day approval procedure for exploration plans does not function as the "essence" of these agreements. The Conference Report notes that the Secretary may delay approval of any proposed exploration plan *beyond* the 30-day period whenever "he believes a suspension of activities on the lease is warranted." H.R. Rep. No. 590, *supra*, at 49.[17] The legislative history is thus consistent with the general rule of construction that a statute establishing a time period for

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[17] Since the Secretary deferred action on the exploration plan until required environmental analyses were conducted, for which a suspension of activities was warranted under the applicable regulations, and since the further suspensions requested by petitioners continue in effect even to this day, the period in which the exploration plan is to be approved under 43 U.S.C. 1340(c)(1) has not even yet commenced to run. See pages 15, 17, *supra*. Petitioners are thus not only wrong in stating that a material breach occurred; they are wrong in stating that any breach at all has occurred. Pet. App. 19a.

governmental action is not mandatory in the absence of express language that specifies a consequence for a failure to comply. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 62-65 (1993) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction"); *Canadian Fur Trappers Corp.* v. *United States*, 884 F.2d 563, 566 (Fed. Cir. 1989).[18] The "coercive sanction" sought by petitioners in this case—rescission and restitution of the lease for an asserted "noncompliance with statutory timing provisions" (but see note 17, *supra*)—is thus not justified by principles either of contract law or of statutory construction.

In light of the inherently complex and lengthy processes involved in the administration of OCS leases, the asserted failure to obtain compliance with this one, specific 30-day approval period was not "of such vital importance" that it deprived petitioners of "the 'essence' of the contract." *United States* v. *Western Cas. & Sur. Co.*, 498 F.2d at 339. See also *City of Fairfax* v. *Washington Metro. Area Transit Auth.*, 582 F.2d at 1327 (rescission cannot "be based on mere delay" of a performance that the contract has not expressly made "of the very essence"); pages 26-27, *supra*.

2. In concluding that no material breach of contract resulted from enactment of the OBPA, the court of appeals properly took into account the fact that the Secretary "could not have issued any permits for exploration so long as North Carolina's [CZMA] objections remained in force" and that petitioners' "failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective." Pet. App. 15a.

[18] See also *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-719 (1990); *Brock* v. *Pierce County*, 476 U.S. 253 (1986).

Petitioners assert (Mobil Br. 29-30; Marathon Br. 39-42) that this concurrent prohibition of lease operations under the CZMA is irrelevant because an award of restitution is not premised on proof from the non-breaching party that it would have been able to perform its side of the bargain. See *Ankeny* v. *Clark*, 148 U.S. 345, 353 (1893). But the issue in this case is not whether petitioners could, in fact, ultimately achieve performance under the contract:[19] it is whether an asserted *delay* resulting from the OBPA "defeated the whole purpose of the contract" and thereby justifies rescission and restitution. *Everett Plywood Corp.* v. *United States*, 512 F.2d at 1093-1094; see pages 27-29, *supra*. The court of appeals correctly reasoned that the asserted delay resulting from the OBPA was, in fact, inconsequential to the essential rights existing under the leases and that rescission and restitution is therefore not justified. Pet. App. 13a. As the court stated, the asserted delay "had no effect upon these OCS leases"—and therefore was not a material breach—because exploration was concurrently stalled in any event due to petitioners' ongoing failure to achieve compliance with the requirements of the CZMA that were expressly incorporated into the leases. *Id.* at 14a.[20]

III. PETITIONERS WAIVED ANY CLAIM FOR MATERIAL BREACH OR REPUDIATION

Petitioners did not treat these leases as materially breached or repudiated when the OBPA was enacted in

[19] Indeed, since petitoners' leases remain in effect, they may still be able to perform under them. That is, presumably, the reason that petitioners have continued to pursue their litigation challenging the CZMA objections of the State of North Carolina.

[20] One of the five leases at issue in this case (see page 8, *supra*) was not part of the Manteo Unit and has never been encompassed within a proposed plan of exploration. The OBPA obviously did not limit any operations under that lease, since none have ever been proposed.

1990. They did just the opposite. They treated the leases as continuing in effect and repeatedly demanded various different types of contract performance by the United States. In particular, after the asserted breach, petitioners (i) submitted a proposed plan of exploration under the leases, (ii) contested the objections of the State of North Carolina to the plan of exploration and to the associated NPDES discharge permit in proceedings under the CZMA conducted first before the Secretary of Commerce and ultimately in federal district court, and (iii) requested and obtained numerous suspensions of lease operations so that they could pursue their continuing efforts to demand and achieve performance under the leases. See pages 15 and 17, *supra*; note 12, *supra*.

Such actions seeking contractual performance after the asserted material breach has occurred are "tantamount to an election to affirm the contract." *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d at 649. Even when a material breach or repudiation occurs, there is no automatic right of rescission and restitution. Instead, a material breach gives the non-breaching party the right to elect whether to treat the contract as at an end or to continue it. *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d at 1313; see pages 30, 32, *supra*. If the non-breaching party decides to treat the contract as at an end, *both* parties are relieved from further performance. If the non-breaching party instead demands further performance under the contract and thereby elects to continue it in effect, *both* parties remain obligated to it.[21] In that situation, the non-breaching

[21] If a party "does what amounts to recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or abstains for a considerable length of time from impeaching it, so that the other is reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, though it be originally impeachable, becomes unimpeachable." *Union Pac. R.R.* v. *United States*, 847 F.2d 1567, 1570 (Fed. Cir. 1988) (quoting *Harvey Radio Labs. Inc.* v. *United States*, 115 F. Supp. 444, 448-449 (Ct. Cl. 1953)).

party has waived the claim for rescission and retains only a claim of damages for partial breach.[22] *Ibid.* See also *Dingley* v. *Oler*, 117 U.S. at 501-504; *Smoot's Case*, 82 U.S. (15 Wall.) at 47-48.

Action taken by the non-breaching party to compel contract performance after a material breach has occurred is the antithesis of the acceptance of a repudiation; it is instead an election to continue performance under the contract. *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d at 1316; see also *Phillips Petroleum Co.*, 225 Ct. Cl. at 578.[23] Such actions are inconsistent with a claim for rescission because, by not treating the contract as at an end and thereby discharging the breaching party of any further obligation under the contract, they deprive that party of the opportunity to save the expense of additional performance. *Ling-Temco-Vought, Inc.* v. *United States*, 475 F.2d at 638, 639 n.5.

For more than two years after the OBPA was enacted, petitioners did not suggest or announce that the leases would be treated as at an end. Instead, both before and after filing this suit in 1992, they continued to demand and obtain a variety of different types of contract performance from the

[22] See also *Phillips Petroleum Co.* v. *United States*, 225 Ct. Cl. 575, 578-579 (1980); *Pinewood Realty Ltd. Partnership* v. *United States*, 617 F.2d 211, 215 (Ct. Cl. 1980); *Airco, Inc.* v. *United States*, 504 F.2d 1133, 1135-1137 (Ct. Cl. 1974); *Ling-Temco-Vought, Inc.* v. *United States*, 475 F.2d 630, 635-639 (Ct. Cl. 1973).

[23] An exchange of correspondence that requests or offers contract performance has been held to constitute a sufficient election to foreclose a claim of material breach or repudiation. See *Dingley* v. *Oler*, 117 U.S. at 503; *Airco, Inc.* v. *United States*, 504 F.2d at 1135-1137.

United States. For example, in submitting a proposed plan of exploration after the OBPA was enacted, Mobil sought to require the Secretary to take affirmative action under the leases and expend resources in doing so. J.A. 115. Nothing in the submission of that proposed plan of exploration communicated to the United States that petitioners were electing to treat the leases as terminated; instead, petitioners were urging continued performance under the leases. *Ibid.* Having thus continued to "urge or demand a compliance with the contract," petitioners cannot now contend that they instead "underst[oo]d it to be at an end." *Smoot's Case*, 82 U.S. (15 Wall.) at 47-48; *Dingley* v. *Oler*, 117 U.S. at 501-504 (same); see also *Union Pac. R.R.* v. *United States*, 847 F.2d 1567, 1570 (Fed. Cir. 1988).[24]

After the alleged material breach of contract, petitioners also affirmatively treated the leases as in effect by pursuing administrative proceedings before the Secretary of Commerce seeking to overturn North Carolina's objections to the plan of exploration under the CZMA. In doing so, petitioners required the expenditure of resources by the Department of Commerce, the Department of the Interior, and the 12 other federal agencies that took part in the administrative proceedings. J.A. 196, 211, 261, 277. Moreover, even after petitioners commenced the present suit for restitution, they have continued to seek enforcement of their lease rights (i) by pursuing their challenge to the State's CZMA objection into federal district court and (ii) by seeking and obtaining extensions of their leases to permit

[24] If a party continues to insist on performance, and fails to declare a contract terminated, after an essential aspect of performance has not occurred in a timely manner, he may not thereafter contend that time was "of the essence" in the performance of that obligation. *Pinewood Realty Ltd. Partnership* v. *United States*, 617 F.2d at 214; *DeVito* v. *United States*, 413 F.2d 1147, 1153-1154 (Ct. Cl. 1969); *Jackson* v. *United States*, 12 Cl. Ct. 363, 365-366 (1987).

those continuing lease enforcement efforts to proceed. See J.A. 168-171; App., *infra*, 2a.

For a period of several years following the enactment (and repeal) of the OBPA, petitioners' conduct has thus been significantly inconsistent with any election to treat these leases as at an end. Their continued efforts to demand and obtain performance under the leases, which have compelled several agencies of the United States to expend considerable resources in continued administration of these leases, represent an "election" that bars any claim for restitution. Petitioners have "affirmed the contract by continuing to perform;" they may therefore obtain recovery only for such damages as are proven to result from the asserted "partial breach" of contract. *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d at 649; see also *Sun Oil Co.* v. *United States*, 572 F.2d 786, 801, 817 (Ct. Cl. 1978).

IV. PETITIONERS HAVE RECEIVED ANY RELIEF TO WHICH THEY ARE ENTITLED

Outside the four corners of this litigation, petitioners have requested and been granted all of the relief to which they may be entitled. Even if some technical breach of the lease agreements occurred, which we dispute, petitioners would be limited to the recovery of such damages as were actually caused by delay imposed by the OBPA. See *Sun Oil Co.* v. *United States*, 572 F.2d at 804- 806.[25] Because the continuing objections of North Carolina to the plan of exploration preclude petitioners from proceeding with *any* exploration

[25] The United States is not liable for damages from a delay in performance that is not caused by its actions. *Merritt-Chapman & Scott Corp.* v. *United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976). Government delays in the approval of OCS lease operations do not support a claim for damages if the lessee's operations would have been delayed for independent reasons. *Sun Oil Co.* v. *United States*, 572 F.2d at 804-806, 817.

or development activities under these leases, petitioners cannot establish that they have suffered any actual injury or damages from the alleged delay in the approval of those plans by the United States.

To the contrary, both before and after enactment of the OBPA, petitioners have requested the Secretary to *suspend* operations under these leases while their challenges to the State's CZMA objections are litigated to conclusion. Both before the OBPA was enacted and after it was repealed, those requests were granted by the Secretary. See pages 9, 15, 17, *supra*. The lease suspensions requested by petitioners thus continue in effect until this day, and they will remain in effect until petitioners' challenge to the State's objections are finally resolved in the separate litigation commenced by petitioners in federal district court. See page 17, *supra*.

Throughout the lengthy period of the lease suspensions that petitioners have requested, the terms of the leases have been continuously extended and petitioners have been relieved of any obligation to make lease rental payments. See page 9, *supra*. Petitioners thus retain the same rights under their leases that they had when the lease suspension first went into effect *before* the OBPA was enacted, in July 1989. As the court of appeals concluded, the "real complaint" of petitioners is that they have been unable throughout this period to satisfy or "override North Carolina's CZMA objections." Pet. App. 16a. Petitioners' continuing failure or inability to provide the data and analysis that would allow them to resolve the State's long-stated environmental objections is "not attributable to" the United States and "does not create an entitlement to any refund of the consideration paid to obtain the lease." *Id.* at 18a.[26]

[26] Because the court of appeals reversed the trial court's conclusion that petitioners were entitled to restitution, it did not address the government's further arguments that the trial court had incorrectly calculated the amount of the award. Accordingly, if this Court reverses the decision of the court of appeals on the issue of liability, the case should be remanded to the court of appeals for further proceedings regarding the proper calculation of the amount of the award.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2000

APPENDIX

Mobil Exploration & Producing U.S. Inc.

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United States Department of the Interior
Minerals Management Service
1201 Elmwood Park Blvd.
New Orleans, LA 70123-2394

Attention: Mr. Ralph Melancon
Regional Supervisor

February 21, 1995

Dear Mr. Melancon:

On November 9, 1994 and again on December 1, 1994 Mobil received a letter from the MMS terminating the suspension for the following OCS leases effective November 10, 1994:

OCS Lease Numbers

00225 00227 00229 00231 00233 00235 00237 00239 00242 00244 00448 00226 00228 00230 00232 00234 00236 00238 00240 00243 00446

The November 9 MMS letter indicated that the suspensions were being terminated because the two studies recommended by the Environmental Sciences Review Panel were sent to the Commerce Secretary (Secretary) and

because on September 2, 1994 the Secretary had denied Mobil's appeals of North Carolina's denials of consistency. However, the time period to seek judicial review of the Secretary's decisions had not expired when the MMS terminated the suspensions. On January 18, 1994 Mobil filed suit challenging the Secretary's decisions with regard to the Manteo Unit. (*Mobil Exploration & Producing Southeast Inc. v. Ronald H. Brown*, Case No. 1: 95CV00093, United States Court for the District of Columbia). Since the Secretary's decision is being challenged, it is not a final decision and will not be until it is upheld by a final nonappealable judgment issued from a court with competent jurisdiction. Thus, Mobil requests a reinstatement of the suspensions effective November 10, 1994 in order that the terms of subject leases be extended for a period of time equal to the period the suspensions are in effect and to allow Mobil two drilling seasons under the EP thereafter.

Mobil makes this request (1) pursuant to 30 C.F.R. § 250.10(b)(6), which allows the Regional Supervisor to grant suspensions when inordinate delays are encountered by the lessee(s) in obtaining required permits or consents, *including judicial challenges or appeals*; and (2) pursuant to the July 12, 1989 Memorandum of Understanding with the State of North Carolina and the MMS which states:

> If the state objects to Mobil's certificate of consistency, or if any other administrative or *judicial appeals arise*, . . . upon Mobil's application, [the MMS will] issue additional suspensions of operations, pursuant to 30 C.F.R. § 250.10, to allow for the resolution of such matters and to allow Mobil two drilling seasons under the EP thereafter. For the purpose of this paragraph, a drilling season is the period of May through October 31.

Any questions please contact the undersigned.

Very truly yours,

/s/ illegible
Toni D. Hennike

cc: Chris C. Oynes
Regional Director
MMS, Gulf of Mexico OCS Region
1201 Elmwood Park Blvd.
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MS 5322

JUN 02 1995

Mobil Exploration & Producing U.S. Inc.
Attention: MS. Toni D. Hennike
Post Office Box 650232
Dallas, Texas 75265-0232

Dear Ms. Hennike:

Pursuant to Minerals Management Service's (MMS) letter dated October 9, 1992, suspensions of operations (SOO) were issued for the 21 leases in the Manteo Unit, Agreement No. 752-290001-0, offshore North Carolina. The letter states that the SOO's will expire when the two studies recommended by the Environmental Sciences Review Panel have been accepted by the MMS and when the U.S. Department of Commerce renders a decision on the appeals from the State of North Carolina's Denial of Consistency Certification on the Exploration Plan and the NPDES Permit.

By letter dated July 22, 1994, the MMS Transmitted the two aforementioned studies to the Department of Commerce, and on September 2, 1994, the Secretary of Commerce issued a decision upholding North Carolina's objection to your proposed Exploration Plan. The MMS letter dated November 9, 1994, provided formal notice that the suspensions for the 21 leases in the Manteo Unit were terminated and that rental payments are to be calculated from November 10, 1994.

Your letter dated Febrary 21, 1995, requests, pursuant to 30 CFR 250.10(b)(6) and the Memorandum of Understanding (MOU) of July 12, 1989, with the State of North Carolina and the MMS, the reinstatement of the SOO's for the Manteo

Unit leases effective November 10, 1994. Our office did not receive the original of this letter; however, a facsimile was received on April 4, 1995.

Mobil filed suit in the U.S. District Court for the District of Columbia (Case No. 1:95V00093) January 18, 1995, challenging the Secretary's decision and stating that the time period to seek judicial review had not expired when the MMS terminated the SOO's.

Although it is our position that the terms of the SOO approval letter dated October 9, 1992, were satisfied, we believe new suspensions are appropriate pursuant to 30 CFR 250.10(b)(6) and the MOU while Mobil seeks judicial review of the Secretary's decision.

Therefore, we hereby approve SOO's for the Manteo Unit leases from November 10, 1994, until a nonappealable final judgment concerning the Secretary of Commerce's decision is issued from a court of competent jurisdiction. However, pursuant to 30 CFR 250.10(e), the SOO's shall not exceed five years.

We request that Mobil immediately notify this office of the decision rendered in its present suit, referenced above, by the delivery of a copy of said decision.

The terms of the Manto Unit leases will be extended for a period of time equal to the period the SOO's are in effect. Rental payments for the 21 leases in the Manteo Unit will be required during the time of the SOO's in accor dance with 30 CFR 218.154(b)(2). The Manteo Unit includes

the following leases:

OCS-A 00225	OCS-A 00236
OCS-A 00226	OCS-A 00237
OCS-A 00227	OCS-A 00238
OCS-A 00228	OCS-A 00239
OCS-A 00229	OCS-A 00240
OCS-A 00230	OCS-A 00242
OCS-A 00231	OCS-A 00243
OCS-A 00232	OCS-A 00244
OCS-A 00233	OCS-A 00446
OCS-A 00234	OCS-A 00448
OCS-A 00235	

If you have any questions, please call Mr. Al Durr at (504) 736-2659.

Sincerely,

(ORIG. SGD.) GARY L. LORE
Chris C. Oynes
Regional Director

[SEAL OMITTED]

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

Dec. 8, 1999

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Re: Appeals of Mobil Oil Exploration and Producing Southeast, Inc. from Objections by the State of North Carolina to its Drilling Discharge Plan and its Plan of Exploration for Monteo Leases

Dear Counsel:

On September 2, 1994, Secretary of Commerce Brown issued a decision declining to override two objections by the State of North Carolina (North Carolina) to the proposed drilling discharges (PDD) and overall Plan of Exploration (POE) by Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) at a site about 38 miles offshore North Carolina. Secretary Brown made the decision pursuant to section 307(c) (3) of the Coastal Zone Management Act (CZMA). Mobil challenged this decision in Federal Court as being arbitrary and capricious in violation of the Administrative Procedure Act (APA). On March 11, 1996, the Court ordered a stay of the litigation and remanded the matter to me for a determination whether the administrative record should be

reopened to receive two studies, one on the impacts of Mobil's proposals on benthic resources and the other on socio-economic resources. *Mobil, et al. v. Brown, et al.*, 920 F. Supp. 1 (D.D.C. 1996).

During this same period, Mobil and Marathon Oil Co. brought an action against the United States for restititution of rents and bonuses paid for the leases underlying the POE and PDD. Mobil argued that the passage of the Outer Banks Protection Act prevented it and Marathon from pursuing their rights under the leases. *Marathon Oil Company v. United States*, 177 F3d 1331 (Fed. Cir. 1999), *petition for cert. filed*, August 11, 1999. In addition, since 1995, several attempts to settle these matters have been initiated and failed.

I decline to reopen the record to admit the two studies at issue in *Mobil v. Brown*. Both this Department and parties to appeals under the CZMA have a strong interest in the finality of my decisions and the administrative process. Moreover, even were I to reopen the record to admit the two studies and reconsider my decision, I would still lack sufficient information to override North Carolina's objection. Thus, I am persuaded that the interest in finality should prevail over any interest the parties may have in supplementing the record. In light of this decision, I continue to encourage Mobil, North Carolina, and other interested parties to work toward resolution of North Carolina's need for additional scientific information about the impacts of Mobil's proposed projects on its coastal uses and resources.

Discussion

On September 2, 1994, Secretary of Commerce Ron Brown declined to override objections by the State of North Carolina (North Carolina) to the Plan of Exploration (POE)

and the Proposal to Discharge Drilling Waste (PDD) associated with the POE submitted by Mobil Oil Exploration & Producing Southeast, Inc. (Mobil). The basis of North Carolina's objections was a lack of necessary information upon which to find the proposals consistent with its coastal management program. North Carolina specifically identified a need for the preparation of a four part fisheries study. In reviewing Mobil's appeals, Secretary Brown was required to determine whether the proposed projects were consistent with the objectives of the CZMA or necessary in the interest of national security. See 15 CFR 930.120, 930.121 and 930.130.

The 1994 decisions were based upon two administrative records that total approximately 10,000 pages of information. In spite of the quantity of material, certain information necessary to the decision was not provided by Mobil; specifically the record lacked information on: (1) the cumulative effects of Mobil's discharges; (2) the ecological effects of Mobil's discharges; (3) the effects on various fisheries of Mobil's discharges; (4) the effects on near-surface animals and planktonic resources of Mobil's discharges; (5) the effects of the discharges on benthic resources; and (6) the socio-economic effects of the POE. These information gaps precluded the conclusion that Mobil's POE and PDD "will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest." 50 CFR 930.121(b).[27]

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[27] See, Decision and Findings in the Drilling Discharge consistency appeal of Mobil Exploration & Producing Southeast, Inc. from an Objection by the State of North Carolina, September 2, 1994, pp. 40-41; Decision and findings in the Plan of Exploration Consistency Appeal of Mobil Exploration & Producing Southeast, Inc. from and Objection by the State of North Carolina, September 2, 1994, p. 33.

The question before me now is whether to reopen the record to admit the two studies and reconsider the prior decisions. I decline to do so.

First, this Department has an interest in the finality of its administrative processes. The regulations of the National Oceanic Atmospheric Administration (NOAA) implementing the CZMA provide for a Secretarial override procedure that includes the filing of technical information, briefs, federal agency comments and, if necessary, a public hearing. See, 15 CFR 930.125, 930.126, 930.127, and 930.129. The regulations provide for extensions of time to be granted, normally in the amount of 15 days. 50 CFR 930.125(c), and 930.126(b). In the case of Mobil's appeals the development of the administrative records was allowed to take eighteen months. The administrative records in both appeals were closed and reopened twice, finally closing May 29, 1992.[28] No request to hold the record open for pending research relevant to my decision was ever submitted by Mobil, North Carolina or any federal agency.

The two studies at issue were completed in March and September of 1993, long after the record closed in May 1992. Yet the studies were still not submitted until July 22, 1994. The studies were submitted by the Minerals Management Service (MMS) without any request to reopen the record or

[28] The administrative record for the PDD was first closed on June 18, 1991. It was reopened at North Carolina's request on April 29, 1992, and remained open for one month as agreed by Mobil and North Carolina, closing for the second time on May 29, 1992, with the submission of Mobil's Supplemental Final Statement. All federal agency comments were received prior to the first closing of the record, including those of the Minerals Management Service dated, December 27, 1990, on the PDD and June 1, 1991, on the POE.

any opportunity for the parties to comment. Subsequently, through its lawsuit, *Mobil v. Brown*, Mobil urged the court to consider the benthic resources and socio-economic impact studies in reviewing Secretarial decisions. Yet, Mobil never requested that I consider the studies during the pendency of its appeals. In fact, in its briefs to me, Mobil stated that the studies "are not even associated with the information issues at issue here."[29]

As provided in the CZMA regulations, consistency decisions are based upon the administrative record developed by the parties and all other interested agencies and members of the public. It is not practical or reasonable to reopen the record now to reconsider prior decisions in light of these two studies. Nor was it reasonable to do so in July 1994, six weeks before the release of the final decisions. Once the administrative record has closed and the decision making process begun, the record should not be reopened unless good cause is shown by the moving party and no prejudice will inure to the other parties. No such request, argument or showing was ever made in these cases. The receipt of these studies two years after the administrative records in these appeals closed, was untimely.

Second, these studies address only two of the six information gaps identified in the 1994 decisions. Were I to reopen the record to consider these studies, and if these studies were sufficient to address the need for analyses and site specific information on benthic resources and socio-economic impacts, there would still remain significant gaps in information necessary for me to override North Carolina's objections. Specifically, for the PDD, I would still lack

[29] See, Mobil's supplemental Final Brief on POE at 11, and Mobil's Supplemental Final Brief on the PDD at 12.

information on: 1) the potential for bioaccumulation of heavy metals and other toxic substances; 2) a worst case analysis that accounts for cumulative impacts and related ecological effects; (3) impacts on near-surface and planktonic resources; and 4) the ecological functions of the Sargassum community. For the POE, I would still lack: 1) site specific information on fishery resources; 2) information on near-surface animals and planktonic resources, particularly as they relate to the Sargassum communities that harbor important resources for fish in their larval state; and 3) site specific studies on potential impacts to the fishery resources.

Without sufficient information to identify the adverse impacts of the proposed projects to the state's coastal resources, I cannot make the finding required by 15 CFR 930.121(b). The two studies at issue cannot, alone, address all the information gaps identified in my September 2, 1994, decisions.

For the foregoing reasons, I decline to reopen the record to include the two new studies and reconsider my decision in this matter.

Sincerely,

/s/ WILLIAM M. DALEY
WILLIAM M. DALEY

cc: The Honorable Stanley S. Harris
United States District Court
for the District of Columbia